Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.

II. No other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, and the defendant knew that the videotape contained no nudity and no sexual conduct, did the government introduce sufficient proof of *scienter* to support a guilty verdict?

III. Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, is an objectively reasonable good faith belief that the videotapes did not depict "sexually explicit conduct" a valid affirmative defense?

IV. Assuming *arguendo* that there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, is 18 U.S.C. § 2256(2)(E) unconstitutionally vague and overbroad?

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OPINIONS BELOW

This Court granted certiorari in this case on June 7, 1993,[1] but remanded the case back to the Third Circuit on November 1, 1993, for reconsideration "in light of the position asserted by the Solicitor General in his brief for the United States". The Supreme Court's order remanding the case is reported in *Knox v. United States*, ___ U.S. ___, 114 S.Ct. 375, 126 L.Ed.2d 325 (1993). The opinion of the Court of Appeals for the Third Circuit on remand is reported in *United States v. Knox*, ___ F.3d ___ (3d Cir. 1994), 1993 WL 664475, and is reproduced in the Appendix to this petition, PA 1-52. The previous opinion of the Court of Appeals for the Third Circuit is reported at 977 F.2d 815 (3d Cir. 1992). The opinion of the district court denying Knox's pretrial motion is reported at 776 F.Supp. 174 (M.D. Penn. 1991).

JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on June 9, 1994, re-affirming Petitioner Stephen Knox's conviction for receipt and possession of child pornography as proscribed by 18 U.S.C. § 2252 *et seq.* This petition for a writ of certiorari was filed within ninety (90) days of judgment by the Third Circuit. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, § 2252(a)(2)[2] and (a)(4)(B) provide in pertinent part:

> (a) Any person who –
>
> (2) knowingly receives . . . any visual depiction that has been mailed, or has been shipped or

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[1] 113 S.Ct. 2926, 124 L.Ed.2d 677 (1993).

[2] This statute was recently held to be unconstitutional on its face. *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), *cert. granted*, 114 S.Ct. 1185 (1994).

transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means . . . , if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(4) either –

(B) knowingly possesses 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct:

shall be punished as provided in subsection (b) of this section.

Title 18, United States Code, § 2256(2) provides in pertinent part:

For the purposes of this chapter, the term –

(2) "sexually explicit conduct" means actual or simulated –

(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) bestiality;

(C) masturbation;

(D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Stephen Knox was convicted on one count of receiving depictions of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(2) and § 2256(2)(E) and one count of possessing three or more items containing a depiction of minors engaged in "sexually explicit conduct" under 18 U.S.C. § 2252(a)(4)(B) and § 2256(2)(E), based solely on three videotapes containing videotaped sequences sold by a Nevada-based company, Nather, Inc. ("Nather").

Although none of the minors depicted in the videotapes were shown to be engaged in any actual or simulated sexual conduct as proscribed by 18 U.S.C. § 2256(2)(A), (B), (C), or (D), and all genitals were fully covered, the district court agreed to decide – and then denied – a pretrial motion to dismiss based upon the contents of the videotapes. The underpinning of the district court's denial was a finding that the uppermost portion of the inner thigh was part of the "pubic area". Since the pubic area was exposed (nude), the district court reasoned, a prosecution based on an exhibition of the pubic area, rather than the genitals, was statutorily authorized:

> Although in every instance the girl's genitals were covered by either underpants or a bathing suit, the area in close proximity to the genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, was clearly exposed.

United States v. Knox, 776 F.Supp. 174, 180 (M.D. Penn. 1991).

At a subsequent bench trial, the trial judge found that the "exhibitions" were "lascivious" and had been received by Knox in the mail. Knox was convicted and, on February 13, 1992, sentenced to the mandatory minimum sentence of five (5) years imprisonment. On October 15, 1992, the Third Circuit Court of Appeals found the district court in error because "[d]isplaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C. § 2256(2)(E)", *United States v. Knox*, 977 F.2d 815, 819-820

(3d Cir. 1992). However, the Third Circuit affirmed Knox's conviction, holding that 18 U.S.C. § 2256(2)(E) included within its scope depictions of minors whose genitals and pubic areas are fully covered by clothing.

After this Court granted a writ of certiorari and Stephen Knox filed his main brief on the merits, the Solicitor General conceded that the Third Circuit "erred in holding that simply focusing on the midsection of a clothed body may constitute an 'exhibition' of the unrevealed body parts beneath the garments." (GRb 10).[3]

The Solicitor General further informed this Court that the legislative history of the statute demonstrated that the statute had been clarified

> in order more clearly to delineate 'what *types of nude portrayals* of children were intended to be encompassed within this definition.'

(Emphasis in the Government's Brief.) (GRb 11).

The government, *sua sponte*, conceded a second error by the Third Circuit in statutory construction, arguing that the statute criminalizes depictions "only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas. *See, e.g., New York v. Ferber*, 458 U.S. 747, 764 (1982)."[4] (GRb 13).

On November 1, 1993, following the filing of the Government's brief, this Court remanded the case to the Third Circuit. On June 9, 1994, the Third Circuit filed its opinion re-affirming Petitioner Stephen Knox's conviction, again holding that 18 U.S.C. § 2256(2)(E) included within its scope depictions of minors whose genitals and pubic areas are fully covered by clothing.

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[3] The Government's Supreme Court Responding Brief is referred to as "GRb".

[4] Petitioner agrees with this position.

B. STATEMENT OF FACTS

1. The Defendant

Petitioner Stephen Knox was, until 1994, an honors graduate student working on his doctorate in history at Pennsylvania State University, where he maintained a 4.0 average. (A 81).[5] In 1986, he graduated summa cum laude with a bachelors degree from Temple University. (A 80). According to Dr. Nan Elizabeth Woodruff, Knox "easily ranks among [the] top five graduate students" at Penn State. (A 82). Similarly, Professor William A. Blair found Knox to have "enriched the graduate community at Penn State" and to have taken substantial initiative in gaining a mastery of his subject matter. Pending the outcome of this case, Knox is working as a printer in Philadelphia.

Although Knox was previously convicted for receiving "child pornography" sold to him by a government sting operation, he has obeyed the terms of his probation, and has been successfully discharged from required therapy sessions. Relying heavily on the psychological evaluation of Dr. Fred Covan, Chief Psychologist at Bellevue Hospital in New York (A 84 to 88), the trial judge concluded that there is "*absolutely no evidence of any inclination by the defendant of untoward conduct toward anyone else*" and granted Knox bail pending appeal. (Emphasis added.) (ST 28 to 29).[6]

2. The Videotapes

Each of the three two-hour-long videotapes[7] seized from Stephen Knox's home consists of up to several dozen

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[5] "A" refers to the Appendix previously filed with the Court.

[6] Three transcripts comprise the entire record in this case. Testimony and argument on the motions on August 28, 1991, are contained in the motion transcript, or "MT". The November 14, 1991, trial has the usual designation of "T". Sentencing and argument on the post-trial motions on February 13, 1992, are contained in the sentencing transcript, or "ST".

[7] The three videotapes and the boxes containing Knox's handwritten notations were marked into evidence and made part of the record as Government Exhibits 5, 6, and 7, respectively. (MT 60).

sequences from a few to fifteen minutes in length. The sequences are "dubs" from videotapes sold by Nather, as evidenced by Knox's hand-written notations on each of the videotape boxes reflecting numerous titles advertised in the Nather brochures, and as demonstrated by the fact that the length of each videotape sold by Nather is considerably less than two hours.[8]

Shown in the videotape sequences are apparently amateur models in poses no different from what one would commonly find in fashion magazines[9] or see on television, in gymnastics meets, on *Star Search* or *America's Funniest Home Videos*. There are also depictions of children horsing around, sitting in parks, and swinging on swings. The children's costumes and leotards, short shorts and skimpy bathing suits (worn by the older teenage models), frilly socks, or biker shorts with lace trim, are wholly appropriate to the ages of the minors wearing them.

Except for one sequence (discussed below), no girls depicted in the videotapes are engaging in conduct which is not commonly portrayed in popular motion pictures, family albums, on the pages of fashion and photography magazines, and on television.[10] None of the models were engaged in any overtly sexual behavior; rather, any sexuality is implied, either by the natural or feigned sensuality of the models, or by the videographer's occasional "zooming in" on the girls' uncovered legs and the clothing covering the genitals, buttocks, and breasts. In reality, the minors in the tapes are doing nothing which anyone observing them from a few feet away would consider "lascivious" or overtly sexual. It cannot be

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[8] *See* the Nather brochures marked into evidence as GX-1 and made part of the record. (T 9).

[9] Fashion magazines, such as *Vogue* and *Seventeen*, routinely feature teenaged girls "alluringly" posed in order to sell a variety of clothing and other products.

[10] Even the behavior in the sequence discussed below does not constitute "sexually explicit conduct" under 18 U.S.C. § 2256(2)(E).

seriously argued that any of the behavior on the part of the children depicted "simulates" sexual conduct of any type.

The only sequence in the videotapes in which a girl intentionally opens her legs to show her panties is an excerpt from the French movie, *Le Grande Chemin* (The Grand Highway - 1988), a general release (not an "adult") movie which had a successful run at foreign film houses throughout the United States, is available for home viewing on videocassette at most major video outlets, and was presented on *Bravo* (a national cable network) on various dates, including January 24, 1994.[11]

There is no question but that the 11-year-old girl in *Le Grande Chemin* was directed to spread her legs in order to show her panties – as witnessed by the dialogue, translated in the subtitles which flash across the screen (and reported here verbatim):

> *Dirty boy! Why do you always stare at my pants?*
>
> I don't. You keep showing them.
>
> *Liar! I saw you when I was in the tree! Admit it, you're curious! You've never seen a girl's wee wee, I bet!*
>
> Yes I have.
>
> *I bet you haven't! Want me to show you?*
>
> Yours? Are you kidding?
>
> *Come and see! Free of charge! Promise not to tell a soul!*

The fact that this sequence was excerpted from a popular film underscores both the vagueness and overbreadth problems which arise from an expansive interpretation of 18 U.S.C. § 2256(2)(E).

3. The Pretrial Motion

The district court granted a pretrial hearing on the issue of whether the three videotapes could be found to depict

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[11] The sequence is contained on the videotape marked *Nather #2*, made part of the record during the pre-trial hearing as Government's Exhibit 6. (MT 60).

minors engaging in "sexually explicit conduct" under the statute, despite the fact that the minors' genitals were completely covered by clothing. Because the defendant waived his right to a jury trial, the court agreed to rule upon an issue usually reserved for trial. *Knox*, *supra*, 776 F.Supp. at 178-179. The trial court observed that "[t]his is a case of first impression." *Id.* at 180.

The government's theory at trial rested upon an exhibition of the pubic area, rather than the genitals. In denying Knox's pretrial motion, the judge adopted a scientifically incorrect view that the uppermost portion of the inner thigh was part of the "pubic area" and – since the inner thigh was exposed (nude) – found the three videotapes contained "exhibitions" under § 2256(2)(E). The court left for trial its determination of whether that exhibitions were "lascivious". *Knox*, *supra*, 776 F.Supp. at 180.

4. The Bench Trial

At the bench trial on November 14, 1991, all testimony and exhibits on the motions to suppress and dismiss were incorporated for purposes of the trial. (T 3). The government introduced advertisements and a catalog for videotapes from Nather, with an address in Las Vegas, Nevada, as well as preprinted envelopes, found at Knox's apartment, which bore Nather's address and were apparently supplied by Nather to facilitate ordering. A $62 Traveller Express money order to Nather, dated June 4, 1990, (twenty-two (22) months prior to the dates on which the indictment alleged the crime was committed) was also introduced. (T 6 to 7).

The government's sole witness, a Customs agent, testified that Knox had rented a mail box at Mail Box Etc. under the name of J. Richard Scott, several months *after* the money order to Nather was written. (T 7 to 9). On cross-examination, the agent acknowledged that the videotapes seized from Knox's apartment may have been "dubs", i.e., not the original tapes made and distributed in interstate commerce by Nather. (T 11). The agent also acknowledged that he had no evidence

that any materials, legal or illegal, were ever received by the defendant at the mail box. (T 12).

The defense offered into evidence various issues of *Video Magazine*, which contained Nather advertisements (T 15 to 16). The government offered copies of Nather brochures, seized from Knox's apartment, which stated that the tapes were legal because they contained no nudity or sexual conduct. (MT 51). The defense argued in summation that the government had failed to prove the element of mailing, the necessary *mens rea*, and adopted the other arguments previously made at the pretrial hearing. (T 17 to 20).

5. The Verdict And Post-Trial Motion

The court filed a written pleading on November 15, 1991, finding the defendant guilty on each count (without reasons), ordered a pre-sentence investigation, and set sentencing for February 13, 1992, at 1:00 p.m.

Prior to sentencing, Knox filed a motion for verdict of acquittal or, in the alternative, for a hearing to explore further "the relationship of the medical and anatomical authorities to the intent of Congress" (A 51 to 55). The motion was supported by an affidavit of Dr. Todd Olson, Director of Human Gross Anatomy at the Albert Einstein College of Medicine, establishing the indisputable fact that the uppermost portion of the inner thigh is not the pubic area. The trial judge denied the motion (A 58 to 60), and sentenced Stephen Knox to the minimum mandatory five (5) year term. (ST 22 to 24).

REASONS FOR GRANTING THE PETITION

A writ of certiorari was previously granted in this case to resolve precisely the same issues raised in this Petition. After this Court remanded the case in light of the government's concession that the Third Circuit had erred in its reading of the statute, the Third Circuit again refused to acknowledge what the government had been forced to concede: that the express language of 18 U.S.C. § 2256(2)(E) does not criminalize depictions of minors whose genitals and pubic areas

are completely covered, and that the legislative history corroborates the view that Congress intended to limit "what types of *nude* portrayals of children were intended to be encompassed" under the law. Congress did not intend to expand the definition to include depictions in which genitals and pubic areas were fully covered.

The fact remains that Petitioner Stephen Knox is the only person ever to be convicted for receiving and possessing depictions of minors whose genitals and pubic areas are fully covered and who are not otherwise engaged in sexual activity.

The Third Circuit's expansion of the child pornography statute will unquestionably have a chilling effect upon legitimate publishers and contravenes the limitations on "child pornography" laws set forth in the Supreme Court's decision in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Worse, the government will have an unlimited charging power. Depictions of minors in bathing suits, leotards, shorts, underwear, and similar clothing are created every day and may be found throughout society. The Third Circuit's decision places all such depictions into a "grey area" where a decision to prosecute rests, in part, on the government's subjective view of the potential defendant. Given the substantial First Amendment rights at stake, the serious penalties faced by defendants convicted of child pornography crimes, and the enormous social stigma attached to those even accused of the crime, the Third Circuit's interpretation cannot constitutionally stand.

The Third Circuit stubbornly adhered to its previous decision, despite the fact that no authority supports it. Where before the Third Circuit claimed the legislative history supported its expansive reading, the Third Circuit has now admitted:

> we conclude that it is wholly silent as to whether Congress intended the statutory term 'lascivious exhibition of the genitals or pubic area' to encompass non-nude depictions of these body parts.

PA 26.

Similarly, where before the Third Circuit found clear support for its expansive reading of the statute in *United States v. Dost*, 636 F.Supp. 828 (S.D. Cal. 1986), *aff'd sub nom.*

United States v. Wiegand, 812 F.2d 1239 (9th Cir.), *cert. den.*, 484 U.S. 856, 108 S.Ct. 164 (1987), it has now argued

> although the fourth *Dost* factor arguably provides no support for our interpretation of the statute as reaching lascivious depictions of a child's fully covered genitals or pubic area, it is clearly not inconsistent with that interpretation.

PA 32-33.

Finally, the Third Circuit again ignored the venerable Rule of Lenity applicable to criminal statutes. Knox stands convicted of conduct neither he nor anyone else could possibly have known was criminal. In finding Knox guilty of "knowingly" receiving and possessing "child pornography", the Third Circuit has held Knox to a standard of *scienter* which is inapplicable to the facts of his case and in conflict with an analogous decision of the Court of Appeals in *United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992).

A. There Can Be No "Exhibition Of The Genitals Or Pubic Area" Under 18 U.S.C. § 2256(2)(E) Where The Genitals And Pubic Area Are Fully Covered By Clothing.

The depictions of minors contained on the Nather tapes clearly fall outside the "hard core of child pornography" at which the federal law is directed. *New York v. Ferber*, *supra*, 458 U.S. at 773, 102 S.Ct. at 3363. It is not open to dispute that the videotapes in *Knox* did not depict "sexually explicit conduct" as defined in 18 U.S.C. §§ 2256(2)(A) through (D). Neither is there any depiction of nudity, even in part, of the genitals or pubic area of any person. As both the District Court and Third Circuit decisions emphasize, in every instance in the Nather tapes, the minors' genitals are fully and opaquely covered by an article of clothing.

1. The "Plain Meaning" Of The Statute Proves Nudity Is Required Under The Statute.

18 U.S.C. § 2256(2) defines "sexually explicit conduct" to include a "lascivious exhibition of the genitals or pubic

area of any person". In the responding brief filed in this Court by the Solicitor General on September 17, 1993, the government agreed with the defendant that the plain meaning of the statute does not encompass depictions of minors whose genitals and pubic areas are fully covered by clothing:

> We believe that . . . the [Third Circuit] erred in holding that simply focusing on the midsection of the clothed body may constitute an 'exhibition' of the unrevealed body parts beneath the garments.
>
> The most natural meaning of [the] term ['lascivious exhibition of the genitals or pubic area'] is that one of those parts of the body – rather than the clothing covering them – must be 'on exhibit'.

GRb 10-11.

Nowhere in its decision on remand did the Third Circuit deal with this critical concession by the government that the theory on which the Petitioner was convicted – that there can be an "exhibition" where the genitals and pubic area are fully covered – is incorrect.

Clearly, if the word "exhibition" has any meaning at all in the statute, it is that the object being "exhibited" must actually be seen. "Exhibition" means "an exhibiting, showing or presenting to view", and "exhibit" means "to offer or *expose to view*; present for inspection". (Emphasis added.) *Random House Dictionary of the English Language* (Unabridged), 1979. "Expose" means "to uncover or bare to the air, cold, etc.; to present to view, exhibit, display", and "view" means "to see, behold". *Id.* The sole antonym listed in the *Random House Dictionary* for "exhibit" is "conceal", a word which means "to *cover* or keep from sight". *Id.* (Emphasis added.) From these definitions, the conclusion is inescapable that the statute proscribes only depictions in which genitals or pubic areas are exposed to view, uncovered, or bared to the air. Genitals which are concealed – that is, fully covered by clothing – cannot, by definition, be exhibited. Thus, a finding that § 2256(2)(E) criminalizes "exhibitions" of the genitals or pubic areas "even when these areas are covered by an article of clothing", is quite literally a

contradiction in terms. *United States v. Knox, supra*, 977 F.2d at 825.

If the plain meaning of the word "exhibition", rather than an admittedly "expansive" interpretation,[12] is adopted, the conclusion is mandated that some exposure of the genitals or pubic area – that is, full or partial nudity – is a prerequisite for an exhibition. On remand, the Third Circuit reasoned that the Nather videos contain "exhibitions" of the genitals or pubic areas because

> Although the genitals are covered, the display and focus on the young girls' genitals and pubic areas apparently still provides considerable interest and excitement for the pedophile observer. . . . *Thus, the scantily clad genitals or pubic area of young girls can be 'exhibited' in the ordinary sense of the word.* . . .

PA 21. (Emphasis added.)

Where the genitals are fully covered, however, they cannot be "exhibited" because no part of the genitals – consisting of the labia majora, labia menora, clitoris, and vagina – can be seen.[13] Neither are the child's genitals exposed to view simply because the viewer is aroused by the depictions.[14] The question is not whether someone might be aroused by fantasies or thoughts of what lies beneath the clothing, but whether the minor is depicted engaging in "sexually explicit conduct" as defined by the statute.

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[12] *See United States v. Knox, supra*, 977 F.2d at 823.

[13] This is so even where a contour or silhouette of the genitals is visible beneath the clothing.

[14] Following this reasoning, almost any image of a child could be criminalized, since it is certain that some people sexually attracted to minors do not require for their arousal that the minors be dressed in bathing suits, leotards, or short skirts. Kenneth Lanning, Supervisory Special Agent for the Behavioral Science Unit of the FBI, labels as "child erotica" all depictions of children which do not run afoul of the law if possessed by a "pedophile", precisely because "pedophiles" may find such depictions erotically arousing or attractive. *See* Lanning, K., *Child Molesters: A Behavioral Analysis for Law Enforcement Officers Investigating Cases of Child Sexual Exploitation.* Washington, D.C.: National Center for Missing & Exploited Children, 1987, pp. 19-20.

Since no minor is exposing her genitals or pubic areas, the Nather tapes are not prohibited under the statute.

2. The Legislative History Proves Nudity Is Required Under The Statute.

As the government was forced to concede in its Responding Brief to this Court,

> the phrase 'lascivious exhibition of the genitals or pubic area' entered the statute . . . as a replacement for an earlier draft provision that would have prohibited depictions of child 'nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.' S. 1011, 95th Cong., 2d Sess. (1977). Objection was made to this language on the ground that it was excessively vague. The phrase 'lewd exhibition of the genitals or pubic area' was substituted at the suggestion of the Department of Justice. That change was made in order more clearly to delineate 'what *types of nude portrayals* of children were intended to be encompassed within this definition'.

GRb 11. (Emphasis added.)

The Third Circuit's conclusion was incongruous with the government's accurate analysis:

> After further examining the relevant legislative history, however, we conclude that it is wholly silent as to whether Congress intended the statutory term 'lascivious exhibition of the genitals or pubic area' to encompass non-nude depictions of these body parts.

PA 26.

In substituting the phrase "lewd exhibition of the genitals" for the "nudity" provision, Congress obviously intended to criminalize only depictions of children whose genitals or pubic areas were nude *and* who were engaged in exhibiting their genitals or pubic areas in a "lewd" (now "lascivious")

manner. The legislative history of 18 U.S.C. § 2252 *et seq.* is replete with examples supporting this reading of the statute embraced both by the government and Petitioner Stephen Knox.

The Third Circuit's claim that there is an equally plausible alternative reading of the statute is blind to the actual words that comprise the legislative history. Throughout the entire legislative history of the child pornography laws, from the early criticism of the "nudity" provision[15], through the late 1980s, not a single member of Congress or witness testifying before the Congress even *suggested* that depictions of minors who were fully clothed and not otherwise engaged in sexual conduct could or even should be prohibited under the law.[16]

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[15] See, for example, the testimony of Paul Bender, former University of Pennsylvania Professor and a member of the Solicitor General's Office that prepared the government's Responding Brief to this Court, *Protection of Children Against Sexual Exploitation*, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate, 95th Congress, First Session, May 27, June 16, 1977, pp. 77-78, and the comments of Congressman Edward I. Koch, *Cong. Rec.* E 3419 (daily ed. June 1, 1977), both criticizing the "nudity" provision.

[16] See, e.g., *Protection of Children Against Sexual Exploitation Act of 1977*, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40; A Bill to Amend the Sexual Exploitation of Children Act of 1977: Hearings on S. 2856 before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, 97th Cong., 2d Sess. 111 (1982) (testimony of Robert Pitler, Bureau Chief of New York's District Attorney's Appeals Bureau, who clearly understood the phrase "lewd exhibition of the genitals or pubic area" to require nudity of those body parts); *Child Pornography*, Hearings before the Subcommittee on Juvenile Justice of the Committee on the Judiciary, United States Senate, 97th Congress, December 10, 1982, pp. 19-20 (testimony of Bruce Rich, on behalf of the Association of American Publishers); *Child Protection Act of 1984*, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492; *Child Sexual Abuse and Pornography Act of 1986*, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952; *Cong. Rec.*, Senate, October 18, 1986, p. S. 17296 (statement of Senator Roth, speaking in support of H.R. 5560, the "Child Sexual Abuse and Pornography Act of 1986", the House counterpart to S. 2398).

Rather, without exception, discussions regarding "chil pornography" were limited to depictions in which childre were engaged in sexual acts or, at the very least, nude.[1

Together with the Justice Department's 1977 criticism o the "nudity" provision, these discussions conclusively demon strate that the phrase "lascivious exhibition of the genitals was intended to narrow the type of nudity which was to b criminalized.

The Third Circuit attempted to explain its expansiv interpretation of 18 U.S.C. § 2256(2)(E) by focusing on th broad Congressional purpose of the statute.

> The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles.

PA 31.

While it is true that the underlying purpose of the federa child pornography law is to prevent psychological harm t children, there is no evidence anywhere to suggest that a image of a minor whose genitals and pubic area are full

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[17] The testimony of Robert Showers, former Director of the Nationa Obscenity and Child Exploitation Task Force in the Department of Justice (an according to his curriculum vitae, the "primary author of the [Reagan] administra tion's Child Protection and Obscenity Enforcement Act of 1988"), before the Senat Subcommittee on Labor and Human Resources on April 27, 1990, regarding th reauthorization of funding for the National Endowment of the Arts, is instructive i this regard, since it demonstrates that even senior officials in the Department o Justice did not, prior to the *Knox* case, envision that the child pornography law extended beyond depictions in which the genitals or pubic areas were nude:

> While many people have claimed that 'lascivious exhibition of the genitals' is substantially overbroad or vague since it could include an innocent picture of a parent's infant taken while the infant was unclothed, the courts have construed such language as including *only nude photographs of minors* which involve a graphic focus on the genitalia or present the child in a sexually provocative manner, such as constitutes a lewd exhibition.

Prepared Statement of H. Robert Showers, Senate Subcommittee on Labor & Human Resources, 101st Congress, 2d Session, April 27, 1990, reprinted i *Cong.Rec.* pp. 301, 306. (Emphasis added.)

covered could, regardless of where the camera is focused, cause the kind of psychological harm with which Congress and the American public were concerned when the first federal child pornography law was passed in 1977. Indeed, labeling the images on the Nather tapes "child pornography" would appear to trivialize the experiences of those who were or are victimized by involvement in *actual* child pornography.

Neither is there any indication in the legislative history that the statute ever intended to criminalize images simply because they are intended to arouse "pedophiles".[18]

As the court taught in *United States v. Villard*, 700 F.Supp. 803, 812 (D.N.J. 1988), "[p]rivate fantasies are not within the statute's ambit". Thus, a fantasy expressed in picture, however distasteful, is not "child pornography" unless it also depicts a child engaged in "sexually explicit conduct". This is why the government told the Supreme Court that

> [d]epictions therefore come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas.

(GRb 13).

The Third Circuit's incorrect reading of the statute also ignores the legal context of the phrase "lewd exhibition of the genitals", which has always required nudity of the genitals or pubic area. The phrase is, as the Supreme Court noted in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), "not unknown in this area and, indeed, was given in [*United States v.*] *Miller* as an example of a permissible regulation." *New York v. Ferber*, 458 U.S. at 764-5, 102 S.Ct. at 3358-9.

In obscenity law (including prior to the passage of the federal child pornography law), "lewd exhibition of the genitals" refers only to those depictions in which the genitals are

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[18] If this were the case, the Congress would certainly have criminalized a much broader range of images, including, for instance, "lascivious" depictions of minors exposing their breasts or buttocks.

exposed, i.e. uncovered, and the subject is engaging in som sort of sexually explicit display of them. For example, *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2 642 (1974), this Court inquired whether the film, *Carn Knowledge*, contained hard core sexual acts or "lewd exhib tions of the genitals" and found that

> [w]hile the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatsoever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standard.

418 U.S. at 161, 94 S.Ct. at 2755.

Read in light of the meaning of the phrase "lewd exhib tion of the genitals" in obscenity law – i.e., to require nudi of the genitals – it is impossible to conclude that Congre intended, in adopting that phrase, to eliminate a nudi requirement. In fact, since Congress did not explicitly *inclu* within the scope of the statute depictions in which minor genitals and pubic areas are fully covered by clothing, th court cannot now expand the law to encompass such depi tions.

3. Precedent Proves Nudity Is Required Under Th Statute.

Since the first child pornography law was passed in 197 no person other than Stephen Knox has been indicted convicted for receiving or possessing depictions of mino whose genitals and pubic areas are fully covered by clothin Nor has anyone – including the producer and seller of th segments contained on the videotapes in question – bee indicted or convicted for producing such depictions. Althoug the lack of prior prosecutions over a period of over fiftee years is not dispositive, it would certainly appear that th

Third Circuit's interpretation is at odds with the general understanding of the statute on the part of law enforcement officials, prosecutors, and the public at large.

In its initial decision, the sole authority relied upon by the Third Circuit in finding that 18 U.S.C. § 2256(2)(E) criminalizes depictions of minors whose genitals are fully covered by clothing was *United States v. Dost, supra*. According to *Dost*, whether an image depicts a "lascivious exhibition of the genitals or pubic area" is determined by analyzing the image for the presence of a number of factors, including

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting . . . is sexually suggestive, i.e., in a place or pose associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F.Supp. at 832.[19]

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[19] The *Dost* factors, of course, are not part of the statute and have not been universally recognized as the definitive interpretation of it. Nor does Petitioner believe they should be. Moreover, Petitioner regards the sixth *Dost* factor as particularly problematic in light of the legislative history of the statute.

Contrary to the Third Circuit's reading of the case, dep
tions of clothed minors were not at issue in *Dost*. Not o
were the subjects "totally nude", 636 F.Supp. at 833, but
Dost court's theoretical application of the test made clear
assumption that some degree of nudity of the genitals or pu
area is a threshold requirement:

> For example, consider a photograph depicting a young girl reclining or sitting on a bed, *with a portion of her genitals exposed.* Whether this visual depiction contains a 'lascivious exhibition of the genitals' will depend on other aspects of the photograph. If, for example, she is dressed in a sexually seductive manner, with her open legs in the foreground, the photograph would most likely constitute a lascivious exhibition of the genitals. . . . On the other hand, if the girl is wearing clothing appropriate for her age, the visual depiction may not constitute a 'lascivious exhibition of the genitals', *despite the fact that the genitals are visible.*

(Emphasis added.) *United States v. Dost*, *supra*, 636 F.Su
at 832.

Nevertheless, in its initial decision, the Third Cir
inexplicably declared that the fourth *Dost* factor

> rests on the implicit assumption that a clothed exhibition of the genitals is criminalized under the statute.

977 F.2d at 823.

The Third Circuit understandably retreated from
position on remand, but still confused the purpose of the *D*
factors, which is to determine whether a given "exhibitio
the genitals or pubic area" is "lascivious", not whether th
has been an "exhibition of the genitals or pubic area" in
first place. Nowhere in *Dost* is there any suggestion tha
"exhibition of the genitals or pubic area" may be satisfied
one or more of the *Dost* factors. Rather, as the Ninth Cir
taught in *United States v. Arvin*, 900 F.2d 1385, 1391 (9th
1990), the *Dost* factors cannot even be applied until i
determined that there is an "exhibition of the genitals or pu
area":

> In formulating an instruction defining 'sexually explicit conduct' under § 2256(2)(E), the Court, of course, must instruct the jury that it must find that the pictures visually depict the minor's genitals or pubic area. This is a threshold element contained in the [statute] itself, distinct from the additional requirement that the depiction be 'lascivious'.

Thus, *Dost* provides no support for the Third Circuit's expansive reading of the statute. Nor does any other case.

B. The Rule Of Lenity Requires Reversal Of Knox's Conviction.

Nothing in the statute, the legislative history, or case law suggests that § 2256(2)(E), encompasses depictions of fully clothed minors in which neither the genitals nor the pubic areas are exposed to view. The Third Circuit's interpretation of this criminal statute is admittedly expansive:

> Although our interpretation of an exhibition is *expansive*, the limiting principle in the statute is the requirement of lasciviousness.

(Emphasis added.) *United States v. Knox*, *supra*, 977 F.2d at 823. On remand, the Third Circuit retained this expansive interpretation (PA 45), which is constitutionally impermissible and violates the Rule of Lenity, "a rule of statutory construction whose purpose is to help give authoritative meaning to the statutory language." *United States v. Thompson Center Arms Co.*, ___ U.S. ___, 112 S.Ct. 2102, 2110 fn. 10, 119 L.Ed.2d 308 (1992).

The main purpose of the Rule of Lenity is, as Justice Stevens observed,

> to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.

United States v. Thompson Center Arms Co., *supra*, 112 S.C
at 2114 (Stevens, J., dissenting).

The Third Circuit misunderstood Petitioner Stephe
Knox's argument that the Rule of Lenity prevents an expan
sive reading of the statute. Petitioner's argument is not, as th
Third Circuit characterized it, that the mere lack of pric
prosecutions invokes the Rule of Lenity. Rather, it is that
the Third Circuit were correct that the statute was meant t
criminalize depictions in which genitals and pubic areas wer
fully covered by clothing, then the statute, as written,
ambiguous and the Rule of Lenity requires Petitioner'
acquittal. The lack of prior prosecutions is powerful evidenc
that the statute as written failed to give Knox "fair warning
that his conduct was criminalized.

The Rule of Lenity requires such "fair warning" in lan
guage that the common world will understand. *Liparota*
United States, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 8
L.Ed.2d 434 (1985). *See also*, *McBoyle v. United States*, 28
U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed.2d 816 (1931
Neither the legislative history, nor the enforcement pattern o
the child pornography laws, nor legal precedent concernin
the phrase "lewd exhibition of the genitals" provide an
indication that depictions in which minors' genitals are full
covered are *or even could be* criminalized under 18 U.S.C
§ 2256(2)(E).

C. The Government Failed To Prove Knox Had the Req uisite *Scienter* To Violate The Statute.

Even assuming *arguendo* that a "lascivious exhibition o
the genitals or pubic area" may include exhibitions of mino
whose genitals are completely covered, Knox lacked the req
uisite *scienter* to commit the crime of receiving and possess
ing "child pornography" because he could not have know
that such depictions ran afoul of the statute. This is not just a
excuse that he was ignorant of the law. Given the history o
law enforcement in this area and the ubiquity of images o
minors whose genitals and pubic areas are fully covered b
clothing, no person could have foreseen that such image

would be found to constitute depictions of "sexually explicit conduct".

Common understanding of what laws mean encompasses not only the language of the statute itself, but also "the gloss which life has written upon it". *Nashville C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369, 60 S.Ct. 968, 972, 84 L.Ed. 1254 (1940). As Professor Bickel has noted, "[t]he average nonreader of the statute books knows of the law what he knows of ethics and customs, and for the rest, what he knows of prosecutions." Bickel, 'The Supreme Court - Foreward,' 75 *Harvard L. Rev.* 40, 63 (1961). The fact that every other prosecution under the statute has involved images of minors whose genitals or pubic areas were nude and exposed to view weighs heavily against any finding that Knox possessed the requisite *scienter* to violate the statute.

As 18 U.S.C. § 2256(2)(E) makes no reference at all to the supposed purpose of materials alleged to depict "sexually explicit conduct", Knox's purported awareness that the videotapes contained "materials designed to sexually arouse a pedophile" (See *United States v. Knox*, *supra*, 977 F.2d at 825) is completely irrelevant to the issue of knowledge. As the Third Circuit itself held in *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989) "[w]hen a picture does not constitute child pornography . . . , it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *See also*, *Faloona v. Hustler Magazine, Inc.*, 607 F.Supp. 1341, 1344-45 (N.D. Texas 1985), affirmed *sub nom. Faloona by Frederickson v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986). There is no question but that many completely legal materials – for instance, depictions of mere nudity, lascivious displays of breasts or buttocks, or "alluring" images such as those often found in fashion magazines and clothing catalogs – may also be arousing to individuals so inclined.

Knowledge of the "general nature and character of t materials" is insufficient in this case to satisfy the *scien* requirement under the child pornography statute. In *Unit States v. United States District Court for Central Dist. Cal.*, 858 F.2d 534 (9th Cir. 1988), the Ninth Circuit held th the First Amendment requires that a defendant charged wi violating 18 U.S.C. § 2251(a) is entitled to an affirmati defense based on a reasonable mistake of age. In *Unit States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th C 1992), the Ninth Circuit found 18 U.S.C. § 2252 unconstit tional because the statute failed to require knowledge by t defendant that at least one of the persons depicted in the filı in question was a minor. Obviously, knowing that the mater depicted "sexually explicit conduct" was not enough if t defendant reasonably believed that the persons depicted we over the age of 18:

> The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers. . . . What the government seems to be saying . . . , however, is that the statute does not even require that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

United States v. X-Citement Video, Inc., 982 F.2d at 1287. *S also*, *United States v. Sherin*, 1987 WL 6146 (S.D.N.Y (judicially engrafting a *scienter* requirement regarding ag onto 18 U.S.C. § 2252 to save it from unconstitutionality

Nor is it enough that a defendant know that the perso depicted are under the age of 18 where, as here, he has reasonable belief that the conduct depicted does not constitu "sexually explicit conduct" as defined by 18 U.S.C § 2256(2). Thus, the Third Circuit's reliance on *Hamling United States*, 418 U.S. 87, 123, 94 S.Ct. 2887, 2910, 4 L.Ed.2d 590 (1974); *United States v. Brown*, 862 F.2d 103 (3d Cir. 1988); and *United States v. Moncini*, 882 F.2d 40

404 (9th Cir. 1989) is misplaced. Hamling, unlike Knox, was obviously aware that he was dealing with materials depicting sexual conduct of the type that could be found to be obscene – i.e., hard-core sex. Both Brown and Moncini knew they were dealing with depictions of minors and they knew that the minors were engaged in "sexually explicit conduct" as defined by the statute. Brown merely believed that the illegal materials depicted adolescent, rather than pre-pubescent, children (a fact irrelevant to guilt under the statute), while Moncini was simply unaware that mailing such materials to the United States was a crime (ignorance of the law).

Knox, however, relied upon the plain meaning of the statute, which does not encompass depictions of minors whose genitals are fully covered, and he knew from advertising brochures that the Nather videotapes contained no nudity and no sexual acts. While the brochures also boasted that the viewer would be sexually aroused by the videotapes, the statute does not criminalize images that are sexually arousing, but rather ones that depict minors engaged in "sexually explicit conduct". Unlike the defendants in *Moncini* or *Brown*, in both receiving and possessing the videotapes, Knox had an objectively reasonable belief that they did not violate the law. Such a belief bars his conviction. In the alternative, a reasonable mistake as to the legality of the materials must be a defense.

D. If There Can Be An "Exhibition Of The Genitals Or Pubic Area" Under 18 U.S.C. § 2256(2)(E) Where The Genitals And Pubic Area Are Fully Covered By Clothing, Then 18 U.S.C. § 2256(2)(E) Is Unconstitutionally Vague And Overbroad.

As construed by the Third Circuit, 18 U.S.C. § 2256(2)(E) is unconstitutional for both vagueness and overbreadth. As this Court recognized thirty years ago:

> The objectionable quality of vagueness and overbreadth . . . [rests] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-3 (1963).

1. As Construed By The Third Circuit, The Statute Is Overbroad.

As construed by the Third Circuit, the term "lascivious exhibition of the genitals" is not sufficiently precise or narrow to pass constitutional muster as a restriction on artistic expression. *New York v. Ferber*, *supra*, sets forth the narrowly tailored parameters of a constitutionally acceptable child pornography law: "[t]he conduct to be prohibited must be adequately defined"; the offense must be "limited to works that visually depict sexual conduct by children below a specified age", that is, "performing sexual acts or lewdly exhibiting their genitals"; and "[t]he category of 'sexual conduct' must also be suitably limited and described". 458 U.S. at 763-4.

The Third Circuit's interpretation of the phrase "lascivious exhibition of the genitals" goes far beyond these parameters, by defining virtually *every* frontal image of a minor, nude or clothed, as an "exhibition of the genitals or pubic area" and by expanding the definition of "sexually explicit conduct" to include innocent conduct, such as dancing or modeling, simply because that conduct "appeals to the lascivious interest of the intended audience". PA 25.

If the Third Circuit's admittedly expansive test is permitted to stand, the chilling effect of the federal statute will be enormous. Anyone who has photographed a minor at a dance

recital or gymnastics meet (where dancers and gymnasts typically adopt "unnatural" and "spread leg" poses), at the beach or at home (where minors may be found to be "scantily clad" in bathing suits, sometimes wet, and underwear) will immediately understand the danger of their depictions ultimately being deemed "lascivious" under the Third Circuit's expansive definitions. Mainstream creators, publishers, producers, distributors and retailers will avoid creating and handling publications, motion pictures, or other visual media depicting minors for fear of running afoul of the law as interpreted by the Third Circuit.

It is hardly comforting that "the limiting principle in the statute is the requirement of lasciviousness", when the Third Circuit employs the *same* criteria to determine what constitutes an "exhibition of the genitals or pubic area" as it does to determine whether an exhibition is "lascivious". "For instance," the Third Circuit argued,

> the first *Dost* factor, 'whether the focal point of the visual depiction is on the child's genitalia or pubic area' [citation omitted], may play an important role in the determination of whether the child subject's genitals or pubic area are on exhibit within the meaning of the statute.

PA 32.

See also PA 21, quoted above, where the Third Circuit concluded that "the scantily clad genitals or pubic area of young girls can be 'exhibited' in the ordinary sense of the word" *because* depictions of them "apparently still provide considerable interest and excitement for the pedophile observer." Given the Third Circuit's definition of "lasciviousness" as that "which would appeal to the lascivious interest of an audience of pedophiles" (PA 26), there is little to distinguish a "lascivious" from a non-lascivious "exhibition of the genitals or pubic area".

Such overbreadth cannot constitutionally be tolerated. When this Court upheld as constitutional the New York child pornography statute, it warned:

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute *by*

> *giving an expansive construction* to the proscription on 'lewd exhibition[s] of the genitals'.

(Emphasis added.) *New York v. Ferber*, *supra*, 458 U.S. at 773, 102 S.Ct. at 3363.

A definition of "exhibition" which includes depictions of minors whose genitals are completely covered violates not only *Ferber*'s constitutionally mandated admonition, but also a time-honored rule of statutory construction:

> When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. [Citation omitted].

New York v. Ferber, 458 U.S. at 769, 102 S.Ct. at 3361.

In short, the Third Circuit's expanded construction of 18 U.S.C. § 2256(2)(E) is precisely that against which this Court warned in *Ferber* as potentially criminalizing a "broad range of innocent conduct".

2. As Construed By The Third Circuit, The Statute Is Void For Vagueness.

A statute which fails to provide adequate notice as to what conduct is prohibited is vague and cannot survive constitutional scrutiny. *Rabe v. Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972). ("To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed.") It is well-established that criminal statutes must contain specific and objective standards so that law enforcement officers may not engage in arbitrary prosecutions and so that citizens, including artists, parents, producers and distributors of mainstream books, magazines, motion pictures, and other visual materials, need not guess at the law's meaning. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). These requirements are even stricter in the First Amendment context, where a higher specificity standard must be met. *Village of Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982). As the Supreme Court held in *Winters v. New York*, 333 U.S. 507, 515, 519 (1948),

> There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. . . . [W]e think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know who would draw the line between the allowable and the forbidden publication.

Congress recognized the pernicious problem of vagueness in 1977 when it rejected the phrase "nudity . . . depicted for the sexual stimulation or gratification of any individual who may view such depiction". Clearly, when Congress rejected that phrase and adopted the term "lascivious exhibition of the genitals", it could not have intended to criminalize depictions of fully clothed minors depicted for the same purpose.

Depictions of minors whose genitals and pubic areas are fully covered by clothing such as leotards, bathing suits, and underwear are indisputably ubiquitous and can be found in newspapers, books, and magazines, clothing catalogs, family albums, on the walls of art museums, in movies and on television, at fashion shows, dance recitals, and gymnastics and swimming meets. If the Third Circuit's interpretation of the statute is permitted to stand, photographers, publishers, parents, distributors, and the public in general will be left guessing if the images they create, publish, sell, and possess daily run afoul of the child pornography law because they were taken at the wrong angle or in the wrong place, time or setting,[20] or because the minor posed in a stance or with a facial expression that was too "adult", or the camera "zoomed in" too closely, or the image might be arousing to

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[20] One factor cited by the Third Circuit, without explanation, as supporting its finding that the minors depicted in the videotapes were engaged in a "lascivious exhibition of the genitals" was that "[n]early all of [the] scenes were shot in an outdoor playground or park setting where children are normally found". PA 26.

"pedophiles". Because no one can predict with reasonable certainty which depictions of minors whose genitals are fully covered by clothing might fall within the definition of 18 U.S.C. § 2256(2)(E) as interpreted by the Third Circuit, the law, as construed, is unconstitutionally vague.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Filed June 9, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-7089

UNITED STATES OF AMERICA

v.

STEPHEN A. KNOX,

Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Crim. No. 91-00074)

Argued August 17, 1992

Decided October 15, 1992

Certiorari Granted June 7, 1993

On Remand from the Supreme Court of the United States
November 1, 1993

Reargued April 27, 1994

Before: HUTCHINSON, COWEN and
WEIS, *Circuit Judges*

(Filed June 9, 1994)

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

The principal question presented by this appeal is whether videotapes that focus on the genitalia and pubic area of minor females constitute a "lascivious exhibition of the genitals or pubic area" under the federal child pornography laws, 18 U.S.C. §§ 2252(a)(2), (4) and 2256(2)(E) (1988 & Supp. IV 1992), even though these body parts are covered by clothing. When this case first came before us, we held that such visual depictions do qualify as lascivious exhibitions and that this interpretation does not render the statute unconstitutionally overbroad. *United States v. Knox*, 977 F.2d 815, 820-23 (3d Cir. 1992), *vacated and remanded*, ___ U.S. ___, 114 S. Ct. 375 (1993).

At the Supreme Court's instruction, we have further considered this case "in light of the position asserted by the Solicitor General in his brief for the United States," *Knox v. United States*, __ U.S. ___, 114 S. Ct. 375 (1993). In that brief and in its subsequent brief filed in this court after the Supreme Court remand, the government argues that the plain language of the statute requires the genitals or pubic area exhibited to be at least somewhat visible or discernible through the child's clothing. We hold that the federal child pornography statute, on its face, contains no nudity or discernibility requirement, that non-nude visual depictions, such as the ones contained in this record, can qualify as lascivious exhibitions, and that this construction does not render the statute unconstitutionally overbroad. Finally, we again conclude that the government presented sufficient evidence at the bench trial to establish both the necessary mens rea and the delivery of the films through interstate mail. We thus will reaffirm Knox's conviction.

I.

In March of 1991, the U.S. Customs International Branch intercepted a mailing to France which contained a request that two videos, "Little Girl Bottoms (underside)" and "Little Blondes," be sent to J. Richard Scott, 210 West Hamilton Avenue, No. 108, State College, Pennsylvania. The parcel also contained a check drawn on the account of defendant Stephen A. Knox and bearing his signature. The check listed his address as 210 East Hamilton Avenue, No. 25, State College, Pennsylvania. A second envelope addressed to J. Richard Scott from the Netherlands

also was confiscated and contained a catalogue advertising for sale videotapes depicting nude, semi-clothed, and clothed minors. Aware that Knox previously had been convicted of receiving child pornography through the mail, the customs investigators obtained a search warrant and with the assistance of the Pennsylvania State Police searched his apartment.[1]

The police officers seized three video cassettes produced by the Nather Company (hereafter "Nather Tapes"), a videotape distribution company based in Las Vegas, Nevada. A catalogue from the Nather Company with checkmarks next to several video selections was also removed from Knox's apartment. One of the marked videos in the brochure corresponded to a segment of a compilation tape which was seized. Envelopes addressed to Nather and Nather mail order forms were discovered as well as a carbon copy of a money order payable to Nather Company for an amount approximately equal to the price of a single video.

The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera. The children were obviously being directed by someone off-camera. All of the children wore bikini bathing suits, leotards, underwear, or other abbreviated attire while they were being filmed. The government conceded that no child in the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by

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[1] The district court determined that the search of Knox's apartment did not violate the Fourth Amendment, and Knox does not contest this decision on appeal.

an abbreviated article of clothing. The photographer would zoom in on the children's pubic and genital area and display a close-up view for an extended period of time. Most of the videotapes were set to music. In some sequences, the child subjects were dancing or gyrating in a fashion not natural for their age. The films themselves and the promotional brochures distributed by Nather demonstrate that the videotapes clearly were designed to pander to pedophiles.

The United States prosecuted Knox based exclusively on the three Nather tapes. Knox was indicted on two counts: (1) knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct; and (2) knowingly possessing three or more videotapes that contain a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2) and (4). "Sexually explicit conduct" for both of these offenses is defined to include a "lascivious exhibition of the genitals or pubic area." *Id.* § 2256(2)(E).

Pursuant to Federal Rule of Criminal Procedure 12(b), Knox filed a pre-trial motion to dismiss the indictment contending that the videos did not contain an "exhibition" of the genitals or pubic area since these areas were always covered by underwear, leotards, or a bathing suit. Knox and the government agreed to a pre-trial hearing to determine whether the indictment was facially sufficient. The district judge viewed portions of the Nather tapes which the parties stipulated were representative of the material contained in the videos. To determine the meaning of the statutory language "exhibition of the . . . pubic area," the district court looked to the plain meaning of the words. Since the pubic area is

located directly adjacent to the genitalia, the district court concluded that other areas in close proximity to the genitals, specifically the "uppermost portion of the inner thigh," were also included in the statutory definition of the pubic area. *District Court Memorandum* at 14; App. at 41. Since the upper portion of the inner thigh was clearly exposed, the court held that the tapes contained an exhibition of the pubic area, and therefore denied Knox's motion to dismiss the indictment.

Knox waived his right to a jury trial and a bench trial was held. At the bench trial, all of the exhibits and testimony from the pre-trial hearing were incorporated into the record for purposes of the trial. Additionally, the government admitted into evidence advertising catalogues from Nather, Nather mail order forms, and envelopes addressed to the Nather Company which were seized from Knox's apartment. The catalogues described in detail the contents and intended effect of the films that could be purchased:

> "Sassy Sylphs" will blow your mind so completely you'll be begging for mercy.
>
> Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

District Court Memorandum at 11; App. at 38.

The government also introduced evidence to establish that Nather mailed the tapes from its office in Nevada to the mailbox which Knox had rented under a fictitious name. Finally, the carbon copy of a sixty-two dollar money order payable to Nather was admitted to prove the method of payment. Although Knox did not testify and called no defense witnesses, he introduced magazine advertisements for Nather's videotapes which claimed that the absence of complete nudity rendered the tapes legal to purchase and possess.

The district court found Knox guilty on both counts. Thereafter, on February 13, 1992, Knox filed a motion for a judgment of acquittal or, alternatively, as he styled it, an application for a hearing to explore the anatomical issue decided by the court, predicated upon the contention that the uppermost portion of the inner thigh is not the pubic area. In conjunction with this motion, Knox submitted the affidavit of Dr. Todd Olsen, Director of Human Gross Anatomy at the Albert Einstein College of Medicine. The affidavit of Dr. Olsen stated that defining the pubic area to encompass the uppermost portion of the inner thigh is anatomically incorrect. Since the motion was filed three months after entry of the verdict, the district court denied the motion as untimely. Knox was sentenced to the minimum mandatory term of imprisonment of five years for each court, to be served concurrently. The sentence has been stayed pending the outcome of this appeal.

Knox appealed the denial of the motion to dismiss the indictment, the guilty verdict, and the denial of the

post-trial motion for judgment of acquittal.[2] We upheld Knox's conviction. In doing so, we interpreted the statutory phrase "exhibition of the genitals or pubic area" as encompassing the lascivious focus on these body parts even though they were always covered by underwear, leotards, or other thin but opaque clothing. *United States v. Knox*, 977 F.2d 815, 820-23 (3d Cir. 1992), *vacated and remanded*, ___ U.S. ___, 114 S. Ct. 375 (1993). We are the first, and to date only,[3] court which has interpreted the

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[2] In our prior consideration of this case, we addressed as a preliminary matter whether we had jurisdiction to review the issues presented in Knox's untimely post-trial motion for a judgment of acquittal. *See United States v. Knox*, 977 F.2d 815, 818-19 (3d Cir. 1992) (Part II), *vacated and remanded*, ___ U.S. ___, 114 S. Ct. 375 (1993). We decided not to address the merits of the motion because we concluded that the district court had not abused its discretion in declining to entertain it in the first instance. *Id.* at 819. We next addressed whether a nude display of the uppermost portion of a minor subject's inner thighs can be a lascivious exhibition of the pubic area. *Id.* at 819-20 (Part III). We concluded that it could not because this portion of the human anatomy is not part of the pubic area as defined in the most widely accepted human anatomy treatises. *Id.* at 819. Because neither Knox nor the government, nor any of the various amici parties, have argued that those conclusions are erroneous, we need not address them in this opinion other than to say that we adhere to the analysis and conclusions set forth in our prior opinion which was vacated by the Supreme Court.

[3] According to several of the briefs submitted to this court, Knox's prosecution is the only one that has been brought by the government where the criminal materials at issue do not contain any nudity at all. The government did not dispute this contention in its brief or at oral argument after remand from the Supreme Court. Thus, for purposes of this appeal we will assume that the contention is true. Of course, we recognize that a prosecutor always has broad discretion to decide the circum-

statute to allow for a conviction under these circumstances.

II.

After we affirmed his conviction, Knox successfully petitioned the U.S. Supreme Court for certiorari. *See Knox v. United States*, ___ U.S. ___, 113 S. Ct. 2926 (1993). In this petition for certiorari, Knox presented four issues, most of which focus on whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.[4] In its brief opposing the grant of

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stances that warrant prosecution of a person for what the prosecutor fairly believes is unlawful conduct. When the prosecutor decides to prosecute, however, it is the exclusive function of the judiciary to determine whether the conduct charged is unlawful unless the prosecutor then withdraws the prosecution.

[4] The four questions presented by Knox in his petition for certiorari are the following:

> 1) Whether there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing.
>
> 2) Where no other prosecution has ever been brought and no there arrest has ever been made charging an exhibition of the genitals which were fully covered by an article of clothing, and the defendant knew that the videotape contained no nudity and was told that the videotape was therefore legal, did the government introduce sufficient proof of *scienter* to support a guilty verdict?
>
> 3) Where no other prosecution has ever been brought and no other arrest has ever been made charging an exhibition of the genitals which were fully

certiorari, the government supported the theory we adopted in upholding Knox's conviction. After the grant of certiorari, and the change in administration following President Clinton's election, the government took a different position.

The government's new position is that while complete nudity is not absolutely required for a depiction to constitute a criminal "exhibition," this court "erred in holding that simply focusing on the midsection of a clothed body may constitute an 'exhibition' of the unrevealed body parts beneath the garments." Gov't Sup. Ct. Brief (Sept. 1993) at 10. In the government's view, a criminal "exhibition" requires both that the visual depiction focus in on the body parts and that it render them visible or discernible in some fashion. *Id.*

Reviewing the legislative history, the government noted that the Justice Department in 1977 had made a suggestion to substitute the phrase "lewd exhibition of the genitals or pubic area" for a more vague phrase in order to more clearly delineate "what *types of nude portrayals* of children were intended to be encompassed" within the statute. *Id.* at 11 (quot.ng *Protection of Children*

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covered by an article of clothing, is an objectively reasonable good faith belief in the legality of the depiction a valid affirmative defense?

4) Assuming *arguendo* that there can be an "exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by clothing, is 18 U.S.C. § 2256(2)(E) unconstitutionally vague and overbroad?

Knox's Petition for a Writ of Certiorari (Sup. Ct. No. 92-1183, October Term, 1992) at (i).

Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 77-78 (1977), *reprinted in* 1978 U.S.S.C.A.N. 63 (letter from Patricia M. Wald, Assistant Attorney General to James O. Eastland, Chairman, Committee of the Judiciary)) (emphasis added by government). The government reads this legislative history as an indication that Congress only intended to criminalize depictions that are at least partly nude in nature. In our prior opinion, we distinguished this legislative history by noting that the language of the Wald letter assumed that Congress only intended to criminalize nude depictions because the language of the bill at that time contained the word "nudity."

As to the scope of nudity required, the government did not go so far as to agree with Knox that complete nudity is required. Rather, the government asserted that Congress intended to criminalize depictions of genitals that are at least somewhat visible. *Id.* at 11-12. Thus, the government stated that a child's genitals which are covered by a transparent or nearly transparent garment, or clothing that is so tight as to reveal completely the contours of the genitals, would constitute a criminal "exhibition" within the meaning of the statute. *Id.* at 12.[5] Ultimately, the government believes that the child's genitals or pubic area must be "discernible" through his or

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[5] The government acknowledged that the adoption of such a standard would be more easily applied to depictions of boys than girls because of obvious anatomical differences. *Id.* at 12 n.3.

her tight clothing in order for the exhibition to be child pornography under 18 U.S.C. § 2256(2)(E).

The government put forth a second reason why our prior opinion could not be fully supported. Relying on the introductory statutory language which states that § 2252(a) covers only depictions involving "the use of a minor *engaging in* sexually explicit conduct," 18 U.S.C. § 2252(a) (emphasis added), the government concluded that a criminal "exhibition" exists only where "the minors who appear in the videotapes can be said to have been acting or posing lasciviously." Gov't Sup. Ct. Brief (Sept. 1993) at 13. Thus, according to the government's position, the appropriate inquiry is on whether the child lasciviously poses her (or someone else's) genitals or pubic area. *See id.* Because neither this court nor the district court interpreted the statute in this fashion, the government requested that the Supreme Court vacate the judgment and remand for reconsideration in light of the "correct" statutory standard.

The government also addressed two related issues in its Supreme Court brief. First, it argued that adoption of the advocated statutory standard would not render the statute unconstitutionally vague or overbroad. *Id.* 14-17.[6] Finally, the government supported that part of our prior opinion which rejected Knox's argument that he did not possess the necessary mens rea to violate the child pornography statute because he did not know the illegal nature of the contents of the videos, and because he relied

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[6] We reject Knox's arguments concerning overbreadth in our prior opinion by finding the term "lascivious" as the limiting principle. *See Knox*, 977 F.2d at 823.

on disclaimers which accompanied the videotapes from their commercial source. *Id.* at 17-20; *see also Knox*, 977 F.2d at 824-25.

In the final section of its Supreme Court brief, the government states that the videotapes at issue in this case might be deemed unlawful under the statutory standard advocated in its brief. Because we did not interpret the statute consistently with the government's new position, the government requested that the case "be remanded so that the Court of Appeals can assess the sufficiency of the evidence under the proper legal standard." Gov't Sup. Ct. Brief (Sept. 1993) at 20. The government clarified that the only task necessary on remand was for this court "simply to determine whether the evidence was sufficient, under the correct legal standard, to support a general verdict of guilty." *Id.* at 23.

Upon the close of briefing in the Supreme Court, but before the case was argued, the Court vacated the judgment and remanded. *See Knox v. United States*, ___ U.S. ___, 114 S. Ct. 375 (1993). The Supreme Court's mandate states the following: "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed September 17, 1993." *Id.* Our charge on remand is to further consider our interpretation of the statute in light of the interpretation advanced by the government in its brief to the Supreme Court.[7]

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[7] After the Supreme Court remanded the case, we granted amicus curiae status to five interested parties, all of which have

III.

Before turning to the merits of the case, we must address on procedural issue. After the Supreme Court vacated the judgment and remanded the case for further consideration, on December 23, 1993 the government filed a Motion to (further) remand the case to the district court. This motion was made during the new briefing schedule established by us on November 17, 1993. The government's motion sought an immediate remand for the purpose of a retrial in the district court to be conducted according to the interpretation of § 2256(2)(E) advocated by the government.

In its motion, the government stated that at the new trial, if granted, it intends to introduce evidence which was not offered at the original trial pursuant to an agreement between Knox and the government whereby the defense agreed to a bench trial in return for use at trial of only certain specific videotapes (i.e., the three Nather tapes). The government requested a suspension of the briefing schedule and an immediate remand to the district court. We entered an order denying the government's request for an immediate remand and a suspension of the briefing schedule; we did, however,

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submitted briefs in this court. Four of the amici parties urge us to reaffirm Knox's conviction on the theory adopted in our prior opinion: 234 Members of Congress; The Institute for Media Education; National Law Center for Children and Families et al.; and National Family Legal Foundation and Morality in Media. The final amicus party, American Booksellers Foundation for Free Expression et al., supports Knox and argues that his conviction on the child pornography charges should be reversed.

inform the parties that we would further consider the merits of the government's motion following the briefing schedule and oral argument.

Other than the arguments made in the December 23, 1993 Motion to Remand, the government has not further briefed this issue. In its brief on the merits, however, the government renews its request that we remand the case to the district court for a new trial. Gov't Brief (March 1994) at 28.

The government argues that a remand is in order because it has espoused a standard for interpreting the child pornography statute that was not used by this court in reviewing the conviction, and that was not used by the district court at trial. Thus, the government believes that Knox should be retried according to the standard urged by the government. According to the government, a retrial would require factual determinations concerning the evidence which would be inappropriate for this court to make, specifically factual findings as to whether any of the depictions in the videos reveal pubic areas or genitalia which are discernible through the opaque clothing. For this reason, as well as others, the government seeks a remand to the district court for a new trial.

In its Motion to Remand, the government also noted that in his reply brief filed in the Supreme Court, Knox requested a remand to the district court in the event the Supreme Court agreed with the government concerning the newly proposed interpretation of the child pornography statute. As noted previously, the government admitted in its motion that if we agree to a remand, it will seek to introduce different evidence at trial. The government

argues that this is still the appropriate course for the case at this juncture given that this court will have a fully opportunity to review the district court's application of the proposed statutory standard in the event that Knox is convicted again.

Following the remand from the Supreme Court, Knox now opposes the government's motion to remand the case. First, Knox argues that a remand for a new trial arguably would run directly contrary to the Supreme Court's mandate for us to reconsider our previous opinion "in light of the position asserted by the Solicitor General," *Knox*,___U.S. ___, 114 S. Ct. 375.[8] Knox also argues that the government's new position raises an ambiguity concerning the statute to which the rule of lenity must be applied. Although Knox has not fully briefed this argument, he contends that jeopardy has attached and that appellate review of the trial record might result in his acquittal as a matter of law. Thus, Knox argues that a remand for the purpose of giving the government a second bite at the evidentiary apple would be constitutionally inappropriate as a violation of the Double Jeopardy Clause of the Fifth Amendment.

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[8] Knox, noting that the case has created a political firestorm, therefore believes that the government wishes to avoid criticism by using additional evidence to gain a conviction in a new trial because the existing record does not contain sufficient evidence to uphold the conviction under the "discernible genitals" standard proposed by the government. We express no opinion concerning this contention.

Amici curiae parties, including the amici Members of Congress, also filed answers in opposition to the government's motion for remand. The amici parties make several arguments as to why granting the motion would be inappropriate. Essentially, they argue that a remand would arguably violate the Supreme Court's mandate, that the only disputed issue is legal in nature and should be decided by this court, and that Supreme Court precedent does not support the view that if at some time during the proceeding both parties seek a remand to the district court, that an appellate court must adhere to that request.

We will deny the government's Motion to Remand because we believe that an immediate remand to the district court for purposes of conducting a retrial without first deciding the legal issue before us would violate the Supreme Court's mandate to this court. The Supreme Court vacated our judgment and remanded the case to us, not the district court, "for further consideration in light of the position asserted by the Solicitor General in his brief for the United States." *Knox v. United States*,___U.S.___, 114 S. Ct. 375 (1993).

In the government's Supreme Court brief, the Solicitor General merely argued that the interpretation of the child pornography statute adopted in our prior opinion was legally incorrect. The government advocated the adoption of a different statutory standard, one that requires the contours of the genitalia or pubic area to be discernible through the opaque clothing in order for possession of the material to be criminal. By remanding the case to this court for further consideration in the first

instance, the Supreme Court declined to address the purely legal question presented.

Although the government's Supreme Court brief did at one point request a remand to this court *or the district court*, it did so only for the purpose of applying the legal standard newly espoused by the government.[9] The government never argued in its Supreme Court brief that the case ought to be remanded to the district court in order for the prosecution to introduce additional evidence

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[9] The government's Supreme Court brief refers to or advocates a remand in five different places. *See* Gov't Sup. Ct. Brief (Sept. 1993) at 9-10, 13, 20, and 23 (both in Part IV and Conclusion). At only one point in the brief did the government mention a remand to the district court. *See id.* at 20. There, the government stated: "[I]f the Court agrees that an incorrect construction of the statutory phrase was used below, the appropriate disposition is to *remand the case to the court of appeals* for application either by that court or the district court of the correct standard to the facts of this case." *Id.* (emphasis added. Thus, even where the brief did mention the district court, it did so only for the purpose of indicating that the appropriate trier of fact should apply the law once it has been adopted or clarified by this court (the court of appeals). Even here the government's Supreme Court brief advocated a remand to this court for reconsideration of the purely legal issue of statutory interpretation. At no point did the government's Supreme Court brief mention the possibility of introducing new evidence at trial if it were to be remanded to the district court. Finally, in the Conclusion section of its brief, the government explicitly requested "a remand to the court of appeals for further proceedings," not to the district court for a new trial. *See id.* at 23. Given that the government sought a remand to this court by the Supreme Court, the Court's simply worded mandate that this court further consider our statutory interpretation makes perfect sense.

which, if admitted, might moot the entire statutory interpretation issue which confronted the Supreme Court and now confronts this court on remand. But that is just the course the government now advocates with its Motion to Remand.

If we were to agree to an immediate remand to the district court for the purpose of holding a retrial with additional evidence, we would be disposing of the case in a manner that was not presented to or contemplated by the Supreme Court. Given that the Supreme Court did not consider the government's requested disposition as an option, it ordered us to further consider our prior interpretation of the child pornography statute in light of the newly advanced standard espoused by the government. If we fail to address the legal issue directly presented by the Solicitor General's brief and the Supreme Court mandate, then arguably we will be ignoring simple instructions from our higher authority. Furthermore, in light of our disposition upholding Knox's conviction after further consideration, the issue of a remand to the district court for a new trial is moot.

Finally, it is important to address another aspect of the government's Motion to Remand. In several instances the government argues that a remand to the district court is exactly the remedy Knox sought in the Supreme Court in the event that the Court agreed that we had adopted the wrong statutory standard. However, Knox requested this disposition only in the Supreme Court, not in this court, and only before the government proposed a remand to the district court for the purpose of introducing additional evidence during the retrial.

Knox sought a remand to the district court for a new trial only if the Supreme Court adopted the government's "discernible genitals" statutory standard, because in Knox's view the record evidence does not support a conviction even under that standard. Therefore, the government's position that the case should be immediately remanded to the district court for a new trial using additional evidence is not advanced in any fashion by the fact that Knox sought a remand from the Supreme Court before the government revealed it would attempt to introduce different evidence in the event a new trial was granted. It is logical for a convicted criminal defendant to seek the alternative remedy of a remand for a new trial in the event an appellate court does not agree that the conviction cannot stand because the evidence was insufficient to convict. In this case, however, the Supreme Court did not address the legal issue, instead leaving it for us to address in the first instance.

Under these circumstances, Knox now opposes a remand to the district court for a new trial using additional evidence and it is not relevant that in the Supreme Court Knox requested a remand to the district court as an alternative remedy to that of an outright acquittal for insufficiency of evidence. *See, e.g., Garcia v. United States*, 469 U.S. 70, 79, 105 S. Ct. 479, 484 (1984) ("[P]rivate agreements between litigants, especially those disowned, cannot relieve this Court of performance of its judicial function. It is our responsibility to interpret the intent of Congress . . . irrespective of petitioners' or respondent's prior or present views.") Since we will deny the government's Motion to Remand because granting it would violate the Supreme Court's mandate, we need not

address whether adopting such a course would implicate double jeopardy concerns.

IV.

We now turn to the merits of the case on remand. The Protection of Children Against Sexual Exploitation Act of 1977, as subsequently amended, criminalizes knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct and knowingly possessing three or more videotapes which contain a visual depiction of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2252(a)(2), (4). "Sexually explicit conduct" for purposes of both of these offenses is defined to include the "lascivious exhibition of the genitals or pubic area." *Id.* § 2256(2)(E). In our prior opinion, we held that the statute contains no nudity requirement because the above quoted statutory phrase refers to a "lascivious exhibition," not a nude or naked exhibition. *Knox*, 977 F.2d at 820. Our review of the relevant legislative history revealed that Knox had not met his burden of demonstrating that Congress clearly intended the statute only to proscribe nude or partially nude displays of the genitals or pubic area. *Id.* at 820-21. Because the meaning of the statutory phrase "lascivious exhibition" under 18 U.S.C. § 2256(2)(E) poses a pure question of law, our review is plenary. *United States v. Brown*, 862 F.2d 1033, (3d Cir. 1988).

Defendant Knox continues to assert that the genitals or pubic area must be unclad or nude, and fully exposed to the camera, before an exhibition may occur. Several amici parties, including the amici Members of Congress, support our prior statutory interpretation that no nudity

is required. The government contends that the pictorial representation of the genitals or pubic area, covered only by underwear, a bikini bathing suit, a leotard, or other abbreviated attire, constitutes a lascivious exhibition if (1) those body parts are at least somewhat visible in the videotapes, and (2) the minors were engaged in conduct that can be judged "lascivious."

When interpreting a statute, the starting point is always the language of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S. Ct. 1534, 1537 (1982). Courts presume that Congress expressed its legislative intent through the ordinary meaning of the words it chose to use, *Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 591 (1962); *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979), and if the statutory language is clear, it is not necessary to glean congressional intent from legislative history, *TVA v. Hill*, 437 U.S. 153, 184 n.29, 98 S. Ct. 2279, 2296 n.29 (1978); *Barnes v. Cohen*, 749 F.2d 1009, 1013 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126 (1985). Thus, it is axiomatic that when the statutory language is clear, the words must be interpreted in accordance with their ordinary meaning. *Dewalt v. Sullivan*, 963 F.2d 27, 30 (3d Cir. 1992). Only the most extraordinary showing of contrary congressional intent may justify altering the plain meaning of a statutory term. *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988).

Knox attempts to read a nudity requirement into a statute which has none. The amended Protection of Children Against Sexual Exploitation Act criminalizes the "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2)(E). In ordinary legal usage, the word "exhibit" means "[t]o show or display; to offer or present

for inspection." Black's Law Dictionary 573 (6th ed. 1990). The genitals or pubic area need not be fully or partially nude in order to be shown or put on display. This plain meaning of the term "exhibition" is confirmed by reference to a popular dictionary of the English language, which defines "exhibit" as "[t]o display; as: a. [t]o present for consideration; set forth . . . . b. [t]o present to view; to show, esp. in order to attract notice to what is interesting or instructive," Webster's New International Dictionary 893 (2d ed. 1959).

Despite our understanding that the ordinary meaning of the term "exhibition" does not require nudity, the government urges us to adopt an intermediate statutory standard which requires that the depiction in question render the minor's genitals or pubic area visible or discernible in some fashion in order to constitute an exhibition. The government attempts to provide support for its "discernible genitals" standard from the plain meaning of the statutory terms and from the legislative history. First, the government argues that the ordinary meaning of the term "exhibition," as used in the statute, contemplates that the genitals or pubic area of the minors depicted must be visible or discernible in some fashion. Absent some visibility or discernibility of the genitals or pubic area, the government in effect agrees with Knox that the depiction is an exhibition of the clothing covering the body parts, rather than an exhibition of the body parts themselves.

In support of this reading of the statute, Knox makes reference to an analogy between the depictions contained in the Nather tapes and an art exhibition. He argues that a celebrated piece of sculpture such as Michelangelo's

David would not be exhibited or on display at all if there was an opaque dropcloth covering the sculpture from head to toe. The government in essence agrees, although it concedes that there would be an exhibition of the sculpture if the *David's* prominent features were discernible or otherwise visible through the dropcloth.

We disagree with this reasoning because we believe that the analogy entirely misses the mark. It may well be that if a work of art is completely covered, any and all of its meaning and value to an observer is lost. That is, any and all of the magnificent qualities which one seeks from viewing the *David* are destroyed by completely covering the statue. In this sense, the completely covered work of art is not being exhibited. In contrast, it is not true that by scantily and barely covering the genitals of young girls that the display of the young girls in seductive poses destroys the value of the poses to the viewer of child pornography. Although the genitals are covered, the display and focus on the young girls' genitals or pubic area apparently still provides considerable interest and excitement for the pedophile observer, or else there would not be a market for the tapes in question in this case. Thus, the scantily clad genitals or pubic area of young girls can be "exhibited" in the ordinary sense of that word, and in fact were exhibited in the tapes which are the subject of Knox's conviction. The analogy made by Knox and the government to exhibitions of covered works of art fails on its own terms.

In any event, we are not called on in this case to interpret the imaginary statutory phrase "art exhibition." Rather, we are called upon to decipher Congress' intent concerning the statutory phrase "lascivious exhibition of

the genitals or pubic area" as used in the federal child pornography statute, 18 U.S.C. § 2256(2)(E). Thus, we must focus not on what would or would not constitute an art exhibition, but rather on whether the ordinary meaning of the term "lascivious exhibition" includes the fully covered genitals or pubic area of minor children.

In pursuing this task, we believe the principle that "[w]ords take on meaning in the company of other words," *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1317 (3d Cir. 1994), is relevant when interpreting terms contained in a statute which Congress passed to curb a particular evil. *See Deal v. United States*, ___ U.S. ___, ___, 113 S. Ct. 1993, 1996 (1993) (it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"). As discussed more fully below, Congress aimed the federal child pornography statute at combatting "the use of children as subjects of pornographic materials[, which] is harmful to the physiological, emotional, and mental health of the child." *New York v. Ferber*, 458 U.S. 747, 758, 102 S. Ct. 3348, 3355 (1982); *see also id.* at 758 n.9, 102 S. Ct. at 3355 n.9. In so doing, Congress defined the "lascivious exhibition of genitals or pubic area" as one variety of "sexually explicit conduct" proscribed by the statute. Thus, we find it more meaningful to focus on the ordinary meaning of the statutory term "lascivious exhibition," rather than simply focusing on the term "exhibition" divorced entirely from the context in which it was used.

The term "lascivious" is defined as "[t]ending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in respect to sexual relations; licentious." Black's Law Dictionary 882 (6th ed. 1990). Hence, as used in the child pornography statute, the ordinary meaning of the phrase "lascivious exhibition" means a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer. Such a definition does not contain any requirement of nudity, and accords with the multi-factor test announced in *United States v. Dost*[10] for determining

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[10] 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S. Ct. 164 (1987). The *Dost* factors were articulated in order to provide a more concrete test for determining whether a visual depiction of a minor constitutes a "lascivious exhibition of the genitals or pubic area" under 18 U.S.C. § 2256(2)(E):

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
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> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
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> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
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> 4) whether the child is fully or partially clothed, or nude;
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> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F. Supp. at 832. The court readily admitted that this list is not exhaustive as other factors may be relevant in particular cases. *Id.*

We formally adopted the *Dost* factors as the relevant test for determining lasciviousness in *United States v. Villard*, 885 F.2d 117,

whether certain material falls within the definition of 18 U.S.C. § 2256(E)(2). Nor does such a definition contain or suggest a requirement that the contours of the genitals or pubic area be discernible or otherwise visible through the child subject's clothing.

The genitals and pubic area of the young girls in the Nather tapes were certainly "on display" as the camera focused for prolonged time intervals on close-up views of these body parts through their thin but opaque clothing. Additionally, the obvious purpose and inevitable effect of the videotape was to "attract notice" specifically to the genitalia and pubic area. Applying the plain meaning of the term "lascivious exhibition" leads to the conclusion that nudity or discernibility are not prerequisites for the occurrence of an exhibition within the meaning of the federal child pornography statute.[11]

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122 (3d Cir. 1989). The analysis is qualitative and no single factor is dispositive. *Id.* Other federal courts have also relied on the *Dost* factors for this purpose. *See United States v. Arvin*, 900 F.2d 1385, 1390-91 & n.4 (9th Cir. 1990), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 672 (1991); *United States v. Wolf*, 890 F.2d 241, 244, 46 (1th Cir. 1989); *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987) (discussing the six *Dost* factors without citing to the *Dost* case); *United States v. Nolan*, 818 F.2d 1015, 1019 n.5 (1st Cir. 1987); *United States v. Mr. A.*, 756 F. Supp. 326, 328-29 (E.D. Mich. 1991).

[11] We note that were we to agree with the government that the correct statutory standard requires the minor subject's genitals or pubic area to be discernible through his or her clothing, we would have no trouble upholding Knox's conviction. We have viewed the Nather tapes. In several sequences, the photographer has focused unnaturally on the genitals of the young girls in close-up shots which reveal the outer contours of the genitals through their tight bathing suits, leotards, or underwear.

Our task of further examining the statutory language in light of the Solicitor General's position also requires us to address whether in our prior opinion we overlooked a requirement that the minor subjects be engaged in conduct that can be judged "lascivious." According to the government, this interpretation of the statute is made necessary by the statutory language of 18 U.S.C. § 2252(2)(A) and (a)(4)(B)(i), which criminalize the possession of material depicting "the use of a minor *engaging in* sexually explicit conduct." *Id.* (emphasis added). Since "sexually explicit conduct" is defined to include "actual or simulated lascivious exhibition of the genitals or pubic area of any person," *id.* § 2256(2)(E), the government concludes that depictions "come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas." Gov't Sup. Ct. Brief (Sept. 1993) at 13.

In its brief after remand, the government recedes somewhat from the view implied by its Supreme Court brief that the depiction must show the child subject to have some lascivious intent. The government now argues only that the material must depict some conduct by the child subject, which includes a "lascivious exhibition of the genitals or pubic area," and which appeals to the lascivious interest of some potential audience. Although the government maintains that we did not address this aspect of the statute, and that a complete statutory interpretation should include this element, it argues that "the tapes in this case easily meet that requirement of the statute." Gov't Brief (March 1994) at 15.

The government is correct that in our prior opinion we did not specifically address this aspect of the statute.

We did not do so because neither Knox nor the government presented for review or argued this aspect of the statute as something the court needed to address in order to decide the case. Upon consideration of the meaning of this statutory language, we reject any contention, whether implied by the government or not, that the child subject must be shown to have engaged in sexually explicit conduct with a lascivious intent.

In *United States v. Wiegand*, 812 F.2d 1239, 1244-45 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S. Ct. 164 (1987), the Court of Appeals for the Ninth Circuit addressed this very question The court stated:

> In the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles. . . . The picture of a child "engaged in sexually explicit conduct" within the meaning of 18 U.S.C. §§ 2251 and 2252 as defined by [§ 2256(2)(E)] is a picture of a child's sex organs displayed lasciviously – that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.

Id. at 1244. *See also United States v. Cross*, 928 F.2d 1030, 1042-43 n.34 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 594 (1991), and ___ U.S. ___, 112 S. Ct. 941 (1992); *Arvin*, 900 F.2d at 1389; Mr. A., 756 F. Supp. at 329; *United States v. McCormick*, 675 F. Supp. 223, 224 (M.D. Pa. 1987).

Children posing for pornographic pictures may suffer dramatic harm regardless of whether they have an "adult" look of sexual invitation or coyness on their face.

Therefore, we adhere to the view that "lasciviousness" is an inquiry that the finder of fact must make using the *Dost* factors and any other relevant factors given the particularities of the case, which does not involve an inquiry concerning the intent of the child subject. Our interpretation of the "lasciviousness" element is consistent with the plain meaning of the statute and furthers Congress' intent in eradicating the pervasive harm children experience when subjected to posing for pornographic purposes.

Thus, we conclude that a "lascivious exhibition of the genitals or pubic area" of a minor necessarily requires only that the material depict some "sexually explicit conduct" by the minor subject which appeals to the lascivious interest of the intended audience. Applying this standard in the present case, it is readily apparent that the tapes in evidence violate the statute. In several sequences, the minor subjects, clad only in very tight leotards, panties, or bathing suits, were shown specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer. In some of these poses, the child subject was shown dancing or gyrating in a fashion indicative of adult sexual relations. Nearly all of these scenes were shot in an outdoor playground or park setting where children are normally found. Although none of these factors is alone dispositive, the totality of these factors lead us to conclude that the minor subjects were engaged in conduct – namely, the exhibition of their genitals or pubic area – which would appeal to the lascivious interest of an audience of pedophiles.

Since the statutory language does not suggest that a nude exhibition is necessary, Knox bears the burden of demonstrating a clear contrary congressional intent to warrant importing into the statute an unexpressed requirement of nudity. *See Malloy*, 860 F.2d at 1183. In our prior opinion, we reviewed the legislative history and concluded that it supported our interpretation of the statutory language. *See United States v. Knox*, 977 F.2d 815, 820-21 (3d Cir. 1992), *vacated and remanded*, ___ U.S. ___, 114 S. Ct. 375 (1993). After further examining the relevant legislative history, however, we conclude that it is wholly silent as to whether Congress intended the statutory term "lascivious exhibition of the genitals or pubic area" to encompass non-nude depictions of these body parts.

The legislative proposal before the original child pornography statute enacted in 1977 would have proscribed "nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. 1011, 95th Cong., 2nd Sess. (1977). Since Congress considered including nudity as an element of a criminal depiction, we continue to believe that the decision to eliminate this requirement must be deemed intentional. Thus, when Congress passed the 1977 Act prohibiting a "lewd exhibition of the genitals or pubic area of any person," it may have desired to criminalize both clothed and unclothed visual images of a child's genitalia if they were lewd.[12] Clearly, Congress

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[12] A subsequent amendment, the Child Protection Act of 1984, replaced "lewd" with the word "lascivious," but the two words have nearly identical meanings. *United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S.Ct. 164 (1987).

could have expressly limited the statute's scope to encompass only naked displays by prohibiting the "lascivious exhibition of the *nude* genitals or pubic area of any person." But this is not the language Congress included in the statute.[13]

Appellant Knox and the government, however, rely on a letter from the Justice Department outlining its views concerning S. 1001, the original proposed bill (containing the nudity language), as evidence that Congress assumed that an exhibition meant a nude, or as the government contends at least a discernible, exhibition of the genitals or pubic area. *See Protection of Children Against Sexual Exploitation: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Comm. of the Judiciary*, 95th Cong., 1st Sess. 77-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 63 (letter from Patricia M. Wald, Assistant Attorney General to James O. Eastland, Chairman, Committee of the Judiciary). After suggesting that "lewd exhibition of the genitals" replace the proposed nudity language, the Assistant Attorney General stated, "Congress could make clear in the legislative history of the bill

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[13] Furthermore, Congress failed to articulate anywhere in its extensive legislative history any desire that the statute, as enacted, prohibit only nude portrayals, or only depictions in which the minor subject's genitals or pubic area are discernible or at least somewhat visible. *See* H.R. Rep. No. 99-910, 99th Cong., 2nd Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952-59; S. Rep. No. 98-169 (98th Cong. 2nd Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 492; H.R. Rep. No. 98-536, 98th Cong., 2nd Sess. (1983); S. Rep. No. 95-438, 95th Cong. 2nd Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40-68; H.R. Rep. No. 95-696, 95th Cong., 2nd Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 69-71; H.R. Conf. Rep. 99-910, 99th Cong. 2nd Sess. (1977).

what types of nude portrayals of children were intended to be encompassed within this definition." *Id.* Upon reexamination, we believe there are two plausible interpretations of this letter and, thus, we conclude that it is not helpful in determining Congress' intent.

Under the first interpretation, which we adopted in our prior opinion, the Wald letter assumes that Congress only desired to prohibit nude exhibitions because at that time the language of the proposed bill included the word "nudity." By subsequently eliminating the word "nudity," Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude exhibitions. Alternatively, it is arguably significant that the language suggesting that Congress clarify what types of nude portrayals would be prohibited was contained in the very letter recommending the substitution of the phrase "lewd exhibition of the genitals" for the original nudity language. *Protection of Children, supra,* 95th Cong., 1st Sess. 77-78. In light of this legislative history, Knox and the government submit that Congress omitted any reference to nudity in the statute by replacing it with the phrase "lewd exhibition of the genitals or pubic area," which does not encompass any depiction of completely clothed, or non-discernible, genitals or pubic area.

Because we find both interpretations of this letter plausible, and the legislative history *in toto* to be silent as to whether Congress intended the statute to reach non-nude depictions, we do not rely on it in adhering to our

prior statutory interpretation.[14] We conclude that Knox has not met his burden of proving that Congress intended

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[14] Nor do we reply on the legislative pronouncements concerning this statute and case recently passed by both houses of Congress. On November 4, 1993, the Senate unanimously adopted an amendment to an unrelated bill confirming "the intent of Congress" that 18 U.S.C. § 2256(2)(E) "is not limited to nude exhibitions or exhibitions in which the outlines of those areas [are] discernible through clothing." 139 Cong. Rec. S14,976 (Daily ed., Nov. 4, 1993). Subsequently on April 20, 1994, the House of Representatives passed by a vote of 425-3 a similar nonbinding resolution expressing the sense of Congress that "the Department of Justice has used its brief in the Knox case as a vehicle for reinterpretation of the child pornography laws in contravention to legislative history," and that "Congress specifically repudiated a nudity requirement for child pornography statutes." 140 Cong. Rec. H2536 (Daily ed. Apr. 20, 1994).

These resolutions are post-enactment legislative history which should be given little, if any, weight because they do not necessarily reflect the intent of the members of Congress who originally enacted the statutory language. As Justice Scalia stated concerning subsequent legislative history:

> "Subsequent legislative history" – which presumably means the post-enactment history of a statute's consideration and enactment – is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expressions *not* of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law *previously enacted* means.
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> . . .
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> Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

Sullivan v. Finkelstein, 496 U.S. 617, 631-32, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring in part).

the statute to reach only a nude "lascivious exhibition of the genitals or pubic area." Thus, we will not read a nudity requirement into a statute that has none.

The underlying rationale for the federal child pornography laws also supports the conclusion that clothed exhibitions of the genitalia are proscribed. When an obscenity statute is challenged as unconstitutional under the First Amendment, the Supreme Court balances the government's interest in protecting the sensibilities of unwilling recipients from exposure to pornography against the dangers of government censorship. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973). Because the government interest, although legitimate, is not compelling, regulation of obscene materials is limited to works which "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24, 93 S. Ct. at 2615.

The Supreme Court allows the states and Congress greater leeway to regulate and proscribe pornography that depicts minors as distinguished from adults since the harmful effects suffered by a child are palpably more

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The language of the child pornography statute at issue in this case was enacted in 1977, and amended in 1984. Since that time there has been such a large turnover in Congress that a majority of the legislators who voted for the recent legislative pronouncements had no role in the passage of the original statute. Thus, we do not consider the subsequent legislative history as providing any indication that the enacting Congress intended the scope of the child pornography statute to cover non-nude depictions.

severe. *New York v. Ferber*, 458 U.S. 747, 756-61, 102 S. Ct. 3348, 3354-57 (1982). The Court relaxes the *Miller* obscenity test when pornographic material portrays minors since the government's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Id.* at 756-57, 102 S. Ct. at 3354 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 102 S. Ct. 2613, 2620 (1982)). The use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. *Id.* at 757, 102 S. Ct. at 3355; *Osborne v. Ohio*, 495 U.S. 103, 109, 110 S. Ct. 1691, 1696 (1990). The psychological effect of visually recording the sexual exploitation of a child is devastating and its elimination is of "surpassing importance." *Ferber*, 458 U.S. at 757, 102 S. Ct. at 3355. Since the child's image is permanently recorded, the pornography may haunt him or her for a lifetime because the child will be aware that the offensive photograph or film is circulating through the masses. *Id.* at 759 n.10, 102 S. Ct. at 3355 n.10 (quoting Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)). The crime is the affront to the dignity and privacy of the child and the exploitation of the child's vulnerability:

> Human dignity is offended by the pornographer. American law does not protect all human dignity; legally, an adult can consent to its diminishment. When a child is made the target of the pornographer-photographer, the statute will not suffer the insult to the human spirit, that the child should be treated as a thing.

United States v. Wiegand, 812 F.2d 1239, 1245 (9th Cir.), *cert. denied*, 484 U.S. 856, 108 S. Ct. 164 (1987). Additionally, controlling the production and dissemination of child pornography is of paramount importance since pedophiles often use child pornography to seduce other children into performing sexual acts. *Osborne*, 495 U.S. at 111, 110 S. Ct. at 1697.

To vindicate the compelling government interest in protecting the safety and welfare of children, not only is the spectrum of constitutionally unprotected pornographic material broader when the subjects are children rather than adults, but also the arsenal of available enforcement mechanisms is more extensive. For instance, the mere possession of child pornography, even in one's home may be criminalized although only distribution of obscenity depicting adults can be proscribed. *Compare Stanley v. Georgia*, 394 U.S. 557, 568, 89 S. Ct. 1243, 1249 (1969) (Georgia statute outlawing private possession of obscenity violates the First Amendment) *with Osborne*, 495 U.S. at 108, 110 S. Ct. at 1694-97 (Ohio statute criminalizing possession of child pornography upheld against First Amendment challenge due to the compelling interest in protecting minors).

The harm Congress attempted to eradicate by enacting the child pornography laws is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles. The child is treated as a sexual object and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude

portrayal. The rationale underlying the statute's proscription applies equally to *any lascivious* exhibition of the genitals or pubic area whether these areas are clad or completely exposed.

Knox next asserts that our decision in *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989), mandates that the genitals or pubic area be exposed before an exhibition may occur. In *Villard*, we stated that "more than merely nudity" was required for a violation of the statute; otherwise, "inclusion of the term 'lascivious' would be meaningless." *Id.* at 121. The requirement of more than mere nudity does not mean, as Knox contends, that nudity is a prerequisite to the existence of an exhibition; rather, *Villard* simply stated the obvious principle that nudity alone is insufficient to constitute a *lascivious* exhibition. No one seriously could think that a Renoir painting of a nude woman or an innocuous family snapshot of a naked child in the bathtub violates the child pornography laws. Nudity must be coupled with other circumstances that make the visual depiction lascivious or sexually provocative in order to fall within the parameters of the statute. Such was our holding in *Villard*, which addressed whether sufficient evidence existed to justify a finding of lasciviousness.

In our prior opinion we went on to sate that our holding in *Villard* provides support for our conclusion that a "lascivious exhibition" includes non-nude depictions of a minor's genitals or pubic area. *See Knox*, 977 F.2d at 822-23. We came to that conclusion because inclusion of the fourth *Dost* factor, "whether the child is fully or partially clothed, as

implicit assumption that a clothed exhibition of the genitals is criminalized under the statute." *Id.* at 823. Knox argues that our reliance on this authority was misplaced because the determination of whether a certain depiction visually displays the minor subject's genitals or pubic area is a threshold inquiry required by the language of the statute itself, whereas consideration of the *Dost* factors is relevant only for the later determination of whether that depiction is lascivious. *See United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir.), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 672 (1991). Knox further contends that it is possible for a minor subject to be *fully clothed* and still exhibit his or her fully exposed genitals – e.g., a well directed side-angle camera shot could reveal the genitals through an opening in the subject's shorts or skirt.

Upon further consideration, we agree with Knox and the *Arvin* court that the question whether the depiction at issue visually exhibits the genitals or pubic area is a threshold determination not necessarily guided by the *Dost* factors. However, we do not agree that the *Dost* factors are completely irrelevant to this threshold determination. For instance, the first *Dost* factor, "whether the focal point of the visual depiction is on the child's genitalia or pubic area," 636 F. Supp. at 832, may play an important role in the determination of whether the child subject's genitalia or pubic area are on exhibit within the meaning of the statute. Nevertheless, although the fourth *Dost* factor arguably provides no support for our interpretation of the statute as reaching lascivious depictions of a child's fully covered genitals or pubic area, it is clearly not inconsistent with that interpretation.

After giving further consideration to the language of the statute, its legislative history, the underlying rationale for the federal child pornography laws, and the brief of Solicitor General submitted on behalf of the United States, we hold that the statutory term "lascivious exhibition of the genitals or pubic area," as used in 18 U.S.C. § 2256(2)(E), does not contain any requirement that the child subject's genitals or pubic area by fully or partially exposed or discernible through his or her opaque clothing. The statutory language is clear and contains no ambiguity. Therefore, the rule of lenity should not be applied to defeat the clear intent of Congress to prohibit the possession of child pornography to the maximum extent allowable under the Constitution. *See, e.g., National Org. for Women, Inc. v. Scheidler*, ___ U.S. ___, ___, 114 S. Ct. 798, 806 (1994) ("the rule of lenity applies only when an ambiguity is present; 'it is not used to beget one' " (quoting *United States v. Turkette*, 452 U.S. 576, 587-88 N.10, 101 S. Ct. 2524, 2531 n.10 (1981)); *Liparota v. United States*, 471 U.S. 419, 427, 105 S. Ct. 2084, 2089 (1985) ("the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress"); *United States v. Bramblett*, 348 U.S. 503, 509-10, 75 S. Ct. 504, 508 (1955).[15]

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[15] Knox contends that because his prosecution and conviction for violating the federal child pornography laws was the first involving materials which contain absolutely no nudity, the rule of lenity must be applied. At the outset, we repeat that the rule of lenity does not apply in this case because the statutory language contains no ambiguity. We also reject this contention because it misconceives the object of the rule of lenity and would produce an absurd result. First, the application of the rule of lenity is not dependent whatsoever on whether there

V.

Interpreting an "exhibition of the genital or pubic area" to include a clothed display of these areas does not render the statute unconstitutionally overbroad.[16] The function of the First Amendment overbredth doctrine is to prevent broadly worded statutes which control constitutionally unprotected conduct from deterring constitutionally protected expression. Invalidating a statute as overbroad, however, is an exceptional remedy and should be employed sparingly and only as a last resort since it is "strong medicine." *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973). Before a child pornography statute is declared unconstitutional, the overbreadth

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have been successful prosecutions under the statute at issue. *Cf., e.g., Ratzlaf v. United States,* ___ U.S. ___, ___, 114 S. Ct. 655, 662-63 (1994) (Court applied the rule of lenity because of an ambiguity in the statute, even though there had been many previous successful prosecutions under the statute). The rule of lenity " ' comes into operation at the end of the process of construing what Congress had expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.' " *Russsello v. United States,* 464 U.S. 16, 29, 104 S. Ct. 296, 303 (1983) (quoting *Callanan v. United States,* 364 U.S. 587, 596, 81 S. Ct. 321, 326 (1961)); *see also United States v. Pollen,* 978 F.2d 78, 85 (3d Cir. 1992), *cert. denied,* ___ U.S. ___, 113 S. Ct. 2332 (1993). Second, if we were to agree with Knox's argument, then the government would never be able to successfully prosecute a person for violating a newly enacted criminal statute, nor would the government be able to successfully proceed under a theory different from that which has yielded convictions in the past.

[16] The term "pubic area" cannot be challenged as vague or overbroad since Knox contends, and we agree, that this phrase describes a precise anatomical region.

must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S. Ct. at 2918. The requirement of substantial overbreadth is equally applicable to challenges that arise in defense of a criminal prosecution. *Ferber*, 458 U.S. at 772-74, 102 S. Ct. at 3363.

In *Ferber*, the Supreme Court held that the New York statute which criminalized the "lewd exhibition of the genitals" was not constitutionally overbroad. *Id.* Although some protected expression, ranging from medical textbooks to National Geographic photographs, could possibly be reached by the statute, this tiny fraction of materials within the statute's coverage could be protected by case-by-case analysis. *Id.* Furthermore, the Supreme Court has repeatedly emphasized that the constitutional rights of adults to obtain, possess, or use sexually explicit material may be limited in order to protect children from exposure to these materials and form sexual exploitation. *See Ginsberg v. New York*, 390 U.S. 629, 634-43, 88 S. Ct. 1274, 1277-82 (1968) (the right to publish and distribute non-obscene material may be limited by banning its sale to minors); *Ferber*, 458 U.S. at 756, 102 S. Ct. at 3345 ("States are entitled to greater leeway in the regulation of pornographic depictions of children" than in protecting against obscenity).

Knox's prediction that our interpretation of an exhibition will result in prosecutors leafing through family albums and church bulletins containing innocent pictures of fully clothed children and pressing charges is unfounded. The limiting principle in the statute is the

requirement of lasciviousness.[17] A visual depiction of a child subject's genital or pubic area, whether the child is clothed or naked, must be lascivious in order to be proscribed. Whether a depiction is lascivious is essentially an inquiry into whether or not the material meets the standard of lasciviousness as guided by the *Dost* factors. *Villard*, 885 F.2d at 122; *see supra* note 10. Only a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious. Even fewer images where a minor's genital area is not fully exposed will constitute lascivious exhibitions since the fact that a child's genital area is covered is a factor militating against a finding of lasciviousness. Thus, including scantily clothed displays of the genitals within the meaning of an exhibition leaves the statute "directed at the hard core of child pornography," *Ferber*, 458 U.S. at 773, 102 S. Ct. at 3363, which results in leaving an indelible psychological scar on the exploited child. Our interpretation simply declines to create an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered.

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[17] The issue is not raised in this case, but we note that although the meaning of lasciviousness is far from crystal clear, it is not unconstitutionally vague or overbroad. *See United States v. O'Malley*, 854 F.2d 1085, 1086-87 (9th Cir. 1988); *Wiegand*, 812 F.2d at 1243.

VI.

On remand, Knox again contends that insufficient evidence was presented at trial for a trier of fact to have found, beyond a reasonable doubt, that (1) the Nather tapes traveled through the mail in interstate commerce; and (2) Knox "knowingly" possessed three pornographic videotapes. Generally, this court must examine the evidence as a whole in the light most favorable to the government, and must sustain a conviction if there is substantial evidence to support it. *United States v. Carr*, No. 93-1796, 1994 WL 237007, at *4-5 (3d Cir. June 3, 1994). When we previously rejected Knox's arguments on this point, we noted that Knox had not timely filed his post-trial motion for acquittal, and thus indicated that the sufficiency of evidence issues might be reviewed only for plain error. *Knox*, 977 F.2d at 824. Nevertheless, we concluded that we did not need to determine whether "the plain error test and the sufficiency of evidence standard are essentially equivalent inquiries" because the government fulfilled the more stringent standard of establishing that the evidence was sufficient "to support the district court's finding that the Nather tapes traveled through the mail and that Knox knowingly received and possessed those films." *Id.*

In its brief submitted to the Supreme Court, the government indicated that we were mistaken in reviewing the evidence only for plain error. Gov't Sup. Ct. Brief (Sept. 1993) at 21-22 n.10. We acknowledge that the analysis following our introductory paragraph quoted above was somewhat unclear as to whether we were applying the plain error or sufficiency of evidence test. We now clarify the conclusion expressed in our prior opinion that

the government did indeed introduce sufficient evidence for the district court to conclude beyond a reasonable doubt that Knox knowingly received the Nather films and that those films traveled through the mail.

To establish interstate mailing, the government introduced evidence that Knox rented a mailbox under a fictitious name and that he received other pornographic materials at that mailbox. When agents searched Knox's apartment pursuant to a valid search warrant, they discovered advertisements from Nather with checkmarks next to several videotapes and envelopes, pre-addressed to Nather, with forms to order Nather tapes. One of the videos marked in the catalogue was included as a segment of a compilation tape found in Knox's apartment. A carbon copy of a $62 money order payable to Nather was also seized from Knox's apartment. Sixty-two dollars is the approximate price of a single Nather tape. Knox is correct that the government never introduced direct evidence that Nather mailed tapes to Knox's rented mailbox. A trier of fact, however, may consider direct and circumstantial evidence and the reasonable inferences to be drawn therefrom.

The above facts provide strong circumstantial support that Nather, a Nevada mail order video company without any offices in Pennsylvania, at some point utilized the postal system to cause the tapes it distributes to be discovered in Knox's apartment in Pennsylvania. *Cf. Turner v. United States*, 396 U.S. 398, 415-17, 90 S. Ct. 642, 652-53 (1970) (although some heroin is produced in this country, the vast majority of heroin is produced abroad; thus, jury could permissibly infer, beyond a reasonable doubt, that defendant possessed a smuggled drug). The

circumstantial evidence was sufficient for the district court to conclude beyond a reasonable doubt that the Nather films traveled through the interstate mails.

The record also contains sufficient evidence for the district court to conclude beyond a reasonable doubt that Knox "knowingly" received and possessed the Nather tapes. Knox maintains that the absence of nudity in the films and the disclaimers in the Nather brochures that the videos were legal to purchase and own disproves the mens rea element of § 2252. We have previously held that the mens rea requirement of § 2252 "does not require that a recipient of child pornography know the precise contents of such materials." *United States v. Brown*, 862 F.2d 1033, 1036 (3d Cir. 1988). In *Brown*, the defendant ordered one film, but accidentally received a different tape. Since the defendant knew the video he requested was child pornography, we deemed it irrelevant that he did not know the exact contents of the substituted tape actually mailed to him.

Knox's argument in this case is somewhat different. He claims that although he knew the contents of the Nather tapes, he was unaware that the videos were child pornography and believed they were legal to own. To address this contention, we look to the Supreme Court's interpretation of a strikingly similar statute for guidance. To fulfill the "knowingly" requirement of 18 U.S.C. § 1461 (the obscenity law concerning adults),[18] the Supreme

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[18] Title 18 U.S.C. § 1461 provides in pertinent part: "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both. . . . "

Court held that the prosecution need only show that the defendant had knowledge of the contents, character, and nature of the materials. *Hamling v. United States*, 418 U.S. 87, 123, 94 S. Ct. 2887, 2910 (1974). To require proof that the defendant knew the materials were obscene, and thus illegal to distribute, would allow defendants to avoid prosecution by claiming ignorance of the relevant law. *Id.* It would be ironic to construe the same word, "knowingly," in the analogous child pornography law as more lenient to criminal defendants since the purpose for enacting the child pornography statute was to create more stringent regulation for child pornography than already existed through the generally applicable obscenity laws. Therefore, to fulfill the knowledge element of § 2252, a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal. *See United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) (no need to prove knowledge of illegality under § 2252); *United States v. Tolczeki*, 614 F. Supp. 1424, 1429 (N.D. Ohio 1985) (same). The child pornography laws would be eviscerated if a pedophile's personal opinion about the legality of sexually explicit videos was transformed into the applicable law.

There is no doubt that Knox was aware of the nature of the Nather tapes when he received them. Newsletters from Nather found in Knox's apartment described the contents of the films – "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy . . . so revealing it's almost like seeing them naked" – and the video's intended effects – "Sassy Sylphs will blow your mind so completely you'll be begging for mercy." Knox

handwrote his own descriptions of the Nather films on the outside of the boxes. For instance, on the Nather II tape, Knox wrote "13-year old flashes" followed by "hot." Knox characterizes the second vignette as "15 year old shows nipple." Both Nather's and Knox's descriptions of the tapes clearly demonstrate that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile. Sufficient evidence was presented at the bench trial to support a finding that Knox was aware of the nature of the Nather tapes, and therefore knowingly possessed and received them.

Even if a reasonable mistake as to the legality of the material was recognized as a defense, the language of the statute is clear that nudity is not a prerequisite for a lascivious exhibition. Additionally, relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advise as to whether the material he earns a living by selling is legal. Nather's disclaimer could not reasonably lead Knox to believe that the videotapes were legal. If anything, the need to profess legality should have alerted Knox to the films' dubious legality.

VII.

In sum, after further consideration of the statutory language, legislative history, the purpose of Congress in passing the federal child pornography statute, and the Solicitor General's brief submitted in the Supreme Court, we hold that a "lascivious exhibition of the genital or pubic area" pursuant to 18 U.S.C. § 2256(2)(E) encompasses visual depictions of a child's genitals or pubic area

even when these areas are covered by an article of clothing and are not discernible. Our interpretation of the statutory language does not render the statute unconstitutionally overbroad since the requirement of lasciviousness limits the proscribed depictions to constitutionally unprotected expression. Finally, there was sufficient record evidence for the district court to conclude beyond a reasonable doubt that Knox knowingly received and possessed the videotapes and that the films traveled through interstate mail. The judgment of conviction will therefore be affirmed.

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No. 94-413

In the Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN A. KNOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether videotapes that focus on the genitals and pubic areas of minor females may constitute "lascivious exhibition[s] of the genitals or pubic area" under the federal child pornography statute, 18 U.S.C. 2252 (1988 & Supp. V 1993) and 2256(2)(E), when those body parts are covered by clothing.

2. Whether petitioner had the requisite mental state to violate 18 U.S.C. 2252 (1988 & Supp. V 1993).

3. Whether 18 U.S.C. 2256(2)(E) is unconstitutionally vague or overbroad.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals following remand from this Court (Pet. App. 1-52) is reported at 32 F.3d 733. The previous opinion of the court of appeals is reported at 977 F.2d 815. The opinion of the district court denying petitioner's pretrial motion to dismiss the indictment is reported at 776 F. Supp. 174.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1994. The petition for a writ of certiorari was filed on September 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of knowingly receiving through the mail visual depictions of minors engaged in sexually explicit conduct and knowingly possessing such visual depictions, in violation of 18 U.S.C. 2252(a)(2) and (4) (1988 & Supp V 1993). He was sentenced to concurrent terms of imprisonment of five years on each count. The court of appeals affirmed. *United States* v. *Knox*, 977 F.2d 815 (3d Cir. 1992). This Court granted Knox's petition for a writ of certiorari, 113 S. Ct. 2926 (1993), and, based on the views expressed in the government's brief on the merits, remanded to the court of appeals for reconsideration in light of the government's position. 114 S. Ct. 375 (1993). After additional briefing and argument, the court of appeals again affirmed petitioner's convictions. Pet. App. 1-52.

1. In April 1991, Customs agents obtained a warrant and searched petitioner's apartment. The agents seized numerous videotapes and printed materials, including the three videotapes on which this prosecution is based. The three videotapes, each of which is between one and one-half and two hours long, were compilations petitioner had made from videotapes sold by the Nather Company of Las Vegas. See 977 F.2d at 817. Petitioner had obtained about 15 videos sold by Nather (for approximately $60 each)—with titles such as *Ripe and Tender*, *Young Flashers*, and *Sweet Young Things*—and had copied selected portions onto his own tapes. 11/14/91 Tr. 5, 11, 18, 24.

A catalogue of Nather Company videotapes "featuring teen and pre-teen girls" was also found in petitioner's apartment. It described *Young and Tight*, one of the

videos from which petitioner made his tapes, as "featuring about 20 young beauties, ages 8-14, performing baton twirling, majorette and gymnastics routines, plus our usual panty-flashing shots and tight young butts in short-shorts and bikinis." With respect to *Lollipops*, which is also excerpted on one of petitioner's tapes, the catalogue states that there is "an enchanting scene showing a dark-haired beauty of 11 letting us have a long, slow look up her dress to view her snow-white panties." In addition, *Lollipops* features "scenes of a thirteen year old in a leopard skin bikini with a magnificent ass that she puts on display for you as she walks back and forth slowly and teasingly." According to the Nather catalogue, *Early Adolescence*, which petitioner copied onto one of his own tapes, was made in response "to the many requests we had been receiving for tapes that had almost exclusively candid panty shots." The catalogue advised that "if you like undies on girls between the ages of 8 and 16, we suggest you order this rare tape today." 11/14/91 Tr. 4-5; GX 1. Nather's promotional materials also asserted that its tapes were "completely legal" because there was "no sex or nudity." See *United States* v. *Knox*, 776 F. Supp. 174, 179 (M.D. Pa. 1991).

The Nather tapes consist primarily of repetitious sequences set to background music. The district court described them as follows: "In each vignette the subject of the video would strike various poses which were obviously being directed by someone off-camera. Whenever a particular pose revealed the girl[']s underpants or the area surrounding her genitals, the camera would zoom in on the area. In the course of each vignette, more than a substantial amount of time was spent focusing in on these areas, as well as the girl's buttocks." 776 F. Supp. at 179. Petitioner's videotapes consist largely of

sequences, lasting up to 15 seconds each, during which all that is visible on the screen is the portion of a young girl from her navel to her thigh. The girls are typically wearing bathing suits or leotards, or spreading their legs so that their panties are visible under a short skirt. Some girls are attired in provocative ways that are inappropriate to their age. In *Young Flasher*, for example, a girl is wearing fishnet stockings, boots, and red lingerie, while *Adolescent Dreams* shows a girl in a maid's costume with fishnet stockings.

2. In 18 U.S.C. 2252 (1988 & Supp. V 1993), Congress prohibited the transportation, receipt, distribution, or possession of visual depictions that involve "the use of a minor engaging in sexually explicit conduct." The term "sexually explicit conduct" is defined to include "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(E). Based on the videotapes seized from his apartment, petitioner was charged with receiving and possessing child pornography, in violation of Section 2252.

Petitioner moved to dismiss the indictment. Petitioner did not dispute that the videotapes were "lascivious." 776 F. Supp. at 180 & n.7. He contended, however, that the Nather tapes did not contain an "exhibition of the genitals or pubic area." *Id.* at 180. The district court noted that "[t]he Nather tapes were fraught with instances of the camera zooming in on the area of the girl's genitals" but acknowledged that "in every instance the girl's genitals were covered." *Ibid.* The court observed, however, that "[s]exually explicit conduct covers exhibitions of the genitals or pubic area." *Ibid.* Concluding that "the pubic area would appear to be the region of the human anatomy in close proximity to the genitals," the court denied the motion to dismiss, explaining that "the area in close proximity to the

genitals, specifically the uppermost portion of the inner thigh area closest to the girl's genitals, was clearly exposed" in most of the videotaped materials. *Ibid.*

A bench trial followed, in which the government argued that petitioner's videotapes constituted "lascivious exhibition[s] of the genitals or pubic area" under the test formulated in *United States* v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd *sub nom. United States* v. *Wiegand*, 812 F.2d 1239, 1245 (9th Cir.), cert. denied, 484 U.S. 856 (1987).[1] The district court found petitioner guilty on both counts. Pet. App. 10.

3. The court of appeals affirmed.

a. The court framed the principal question as "whether videotapes that focus on the genitalia and pubic area of minor females constitute an 'exhibition of the genitals or pubic area' under the federal child pornography laws * * * even though these body parts are covered by clothing." 977 F.2d at 817. Initially, the court determined that the district court had erred by concluding that the pubic area includes the upper portion of the

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[1] The court in *Dost* identified the following factors as relevant to the application of the statute:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> 4) whether the child is fully or partially clothed, or nude;
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F. Supp. at 832.

inner thigh. The court explained that "[t]he most widely accepted human anatomy treatises make clear that the pubic area is entirely above the genitals and not below or alongside that portion of the anatomy." *Id.* at 819 (citing H. Gray, *Gray's Anatomy* 90-91 (30th ed. 1985), and *Dorland's Illustrated Medical Dictionary* 1533 (27th ed. 1988)).

The court of appeals rejected, however, petitioner's contention "that the genitals or pubic area must be nclad or nude, and fully exposed to the camera, before an exhibition may occur." 977 F.2d at 820. The court observed that the dictionary definition of "exhibit" is "to present to view," "to show publicly," or to "put on display in order to attract notice." *Ibid.* (quoting *Webster's Third New International Dictionary, Unabridged* 796 (1976)). The visual depictions in petitioner's videotapes, the court found, clearly put the genitals and pubic areas of the young girls "'on display' as the camera focused for prolonged time intervals on close-up views of these body parts." 977 F.2d at 820. In addition, "the obvious purpose and inevitable effect of the videotapes was to 'attract notice' specifically to the genitalia and pubic area." *Ibid.* The court concluded that using the ordinary definition of "the word 'exhibition' leads to the conclusion that nudity is not a prerequisite for the occurrence of an exhibition." *Ibid.*

The court of appeals found support for its interpretation in the legislative history of Section 2256(2)(E). An early draft version of that statutory provision prohibited only nude depictions of children. Congress, however, omitted any reference to nudity in the legislation that was ultimately enacted. 977 F.2d at 820-821. The court of appeals regarded that change as an indication of Congress's intent to "criminalize both

clothed and unclothed visual images of a child's genitalia if they were lewd." *Id.* at 820.

b. The court of appeals held that the statute, so construed, was not unconstitutionally vague or overbroad. The court explained that "[a]lthough our interpretation of an exhibition is expansive, the limiting principle in the statute is the requirement of lasciviousness." 977 F.2d at 823.

c. Finally, the court of appeals rejected petitioner's contention that he lacked the requisite mental state to violate the federal child pornography statute because he had believed Nather's assertion that its tapes were "completely legal." See 776 F. Supp. at 179. The court noted that a defendant charged with possession or receipt of child pornography "simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal." 977 F.2d at 825. In this case, the court concluded, there was no doubt that petitioner was aware of the nature and character of the videotapes in question. Nather's promotional materials claimed that its films featured "girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy," and added that "it's almost like seeing them naked (some say even better)." *Id.* at 818. "[C]hild pornography laws," the court of appeals stated, "would be eviscerated if a pedophile's personal opinion about the legality of sexually explicit videos was transformed into the applicable law." *Id.* at 825.

4. This Court granted Knox's petition for certiorari. 113 S. Ct. 2926 (1993). The United States' brief on the merits argued that a minor's genitals must be either nude or discernible under clothing to constitute an "exhibition" within the meaning of the statute. In accordance with the government's suggestion, this Court vacated the judgment of the court of appeals and

remanded the case for further consideration in light of the position taken by the United States. 114 S. Ct. 375 (1993).

5. Following additional briefing and argument, the court of appeals issued a new opinion, in which it adhered to its interpretation of the statute and affirmed petitioner's convictions. Pet. App. 1-52. The court reiterated its previous holding that Section 2256(2)(E) does not require nudity, explaining that in ordinary usage the phrase "lascivious exhibition" encompasses "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." Pet. App. 29. The court also held that an exhibition of the genitals or pubic area does not require visibility or discernibility:

> The genitals and pubic area of the young girls in the Nather tapes were certainly "on display" as the camera focused for prolonged time intervals on close-up views of these body parts through their thin but opaque clothing. Additionally, the obvious purpose and inevitable effect of the videotape was to "attract notice" specifically to the genitalia and pubic area. Applying the plain meaning of the term "lascivious exhibition" leads to the conclusion that nudity or discernibility are not prerequisites for the occurrence of an exhibition within the meaning of the federal child pornography statute.

Pet. App. 30.

In the alternative, the court of appeals held that on the record in this case, it would sustain petitioner's convictions even if the statute required discernibility of genitals under clothing. Pet. App. 30 n.11. The court explained that "[i]n several sequences, the photographer

has focused unnaturally on the genitals of the young girls in close-up shots which reveal the outer contours of the genitals through their tight bathing suits, leotards, or underwear." *Ibid.*

The court of appeals rejected petitioner's contention that Section 2256(2)(E), construed to prohibit non-nude depictions, was unconstitutionally overbroad. Pet. App. 44-46. Noting that "[t]he limiting principle in the statute is the requirement of lasciviousness," *id.* at 45-46, the court explained that "[o]nly a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious." *Id.* at 46. Finally, the court again rejected petitioner's contention that, even if he was aware of the nature of the videotapes, he could not be convicted of "knowingly" possessing the proscribed materials because "he was unaware that the videos were child pornography and believed they were legal to own." *Id.* at 49.

ARGUMENT

Petitioner renews his contentions that the federal child pornography statute requires nudity in order to find a lascivious exhibition of the genitals or public area, that he lacked the mental state necessary to violate the statute, and that the statute as construed by the court of appeals is unconstitutional. Those claims lack merit. In our view, the court of appeals on remand correctly interpreted the statute to cover all lascivious exhibitions of the genitals of children; neither nudity nor discernibility of the genitals through clothing is a required element of the offense. Petitioner, moreover, knew the nature and contents of the materials he possessed, and he therefore satisfied the knowledge element of the statute. Finally, the statute, as construed

by the court of appeals, is neither vague nor overbroad. Because the decision below is correct and does not conflict with the decision of any other court, further review is not warranted.[2]

1. Petitioner contends (Pet. 9-22) that the federal child pornography statute does not apply to lascivious depictions of children whose genitals and pubic areas are covered by clothing. In petitioner's view (Pet. 12), the statute "proscribes only depictions in which genitals or pubic areas are exposed to view, uncovered, or bared to the air." That claim is inconsistent with the text, history, and protective purpose of the federal child pornography statute.

a. In arguing that a "lascivious exhibition of the genitals or pubic area" requires a depiction of nude genitals or the pubic area, petitioner notes (Pet. 12) that one meaning of the word "exhibit" is "to offer or *expose to view*" or "to uncover." The ordinary definition of the word "exhibition," however, is not restricted to that meaning. As the court of appeals pointed out, the word "exhibit" encompasses the meaning "[t]o display; as: a. [t]o present for consideration; set forth * * * b. [t]o

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[2] Petitioner's sole submission with respect to the construction of the phrase "lascivious exhibition of the genitals" is that nudity of the genitals is required. He expressly disavows the view that genitals that are discernible through opaque clothing may constitute an "exhibition." Pet. 13 n.13. We note, however, that even if the statute were construed to require that a minor's genitals be nude or discernible under clothing, it would not assist petitioner. The court of appeals held, in the alternative, that petitioner's tapes contain depictions of minors in which the genitals are discernible. Pet. App. 30 n.11. Our position in this Court is that it is unnecessary to show discernibility under the statute. The court of appeals' alternative holding, however, makes clear that even under a narrower reading of the statute, petitioner would not prevail on the record in this case.

present to view; to show, esp. in order to attract notice to what is interesting or instructive." Pet. App. 26 (quoting *Webster's New International Dictionary* 893 (2d ed. 1958)). Particularly in the phrase "lascivious exhibition," the concept of an exhibition does not require nudity.[3] The sexual implications of certain modes of dress, posture, or movement may readily put the genitals on exhibition in a lascivious manner, without revealing them in a nude display. The depictions contained on petitioner's tapes confirm that point.

As the court of appeals noted, "[t]he genitals and pubic area of the young girls in the Nather tapes were certainly 'on display' as the camera focused for prolonged time intervals on close-up views of these body parts through their thin but opaque clothing." Pet. App. 30. Indeed, the manifest purpose of the videotapes was "to attract notice" specifically to the genitalia and pubic area, *ibid.*, in order to stimulate sexual arousal. An example of this is a scene from *Outrageous Playground* in which a girl wearing a blue miniskirt bends over against a tree and spreads her legs so that the camera can focus on her genital area and white panties. The tapes, in short, contained "lascivious exhibitions" within the meaning of the child pornography statute, because they deliberately draw attention to the genitals of young girls in unnatural and sexually provocative ways.

b. Petitioner errs in suggesting (Pet. 14-18) that the legislative history reveals a clear congressional intent to require nudity in prosecutions brought under Section 2256(2)(E). During the deliberations leading to the

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[3] The term "lascivious" is defined to mean "[t]ending to excite lust; lewd; indecent; obscene; sexual impurity; tending to deprave the morals in respect to sexual relations; licentious." Pet. App. 29, quoting *Black's Law Dictionary* 882 (6th ed. 1990).

enactment of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978), Congress considered a legislative proposal that would have proscribed depictions of minors engaged in "nudity, which nudity is depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. 1011, 95th Cong., 2d Sess. (1977). That language was rejected in favor of the phrase "lewd exhibition of the genitals or pubic area."[4] Petitioner's approach would therefore read into the statute a requirement of "nudity" that was dropped during the drafting process. But "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[5]

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[4] Assistant Attorney General Patricia M. Wald, who suggested the use of the phrase "lewd exhibitions of the genitals," observed that "Congress could make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within this definition." S. Rep. No. 438, 95th Cong., 1st Sess. 28 (1977). See also H.R. Rep. No. 696, 95th Cong., 1st Sess. 21 (1977) (Statement of Deputy Assistant Attorney General John C. Keeney). That statement could be read to imply that only nude depictions should be covered. But neither the Justice Department nor, more significantly, any member of Congress expressly stated that the statute would proscribe only nude depictions.

[5] The word "lascivious" was substituted for "lewd" in a 1984 amendment. Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a)(4), 98 Stat. 205. "Lascivious" and "lewd" are essentially synonymous. *United States* v. *Wiegand*, 812 F.2d at 1243. Congress replaced "lewd" with "lascivious" in 1984, however, because "lewd" had been associated with obscenity, and Congress wanted "to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful." 130 Cong. Rec. 7196 (1984) (Sen. Specter).

c. The court of appeals' construction of Section 2256(2)(E) is also consistent with the purposes Congress intended the child pornography statute to serve. Depictions such as are involved in this case constitute "a permanent record of the child['s] participation [in the production of sexually oriented material] and the harm to the child [would be] exacerbated by their circulation." *New York* v. *Ferber*, 458 U.S. 747, 759 (1982). Such depictions, moreover, could be used by pedophiles "to seduce other children into sexual activity." *Osborne* v. *Ohio*, 495 U.S. 103, 111 (1990). Those effects—the exploitation and later humiliation of the children induced to perform for pornographic productions—have long been a focus of congressional concern. See S. Rep. No. 169, 98th Cong., 1st Sess. 6-7 (1983); H.R. Rep. No. 536, 98th Cong., 1st Sess. 2-3 (1983). And child pornography may have those effects not only when children are posed in the nude, but also when a child is directed by a person off-camera to strike provocative poses, unnatural for the child's age, while the camera zooms in on the genital and pubic areas. Pet. App. 7-8.

Contrary to petitioner's claim (Pet. 21-22), the rule of lenity does not justify inserting a nudity element into the statute. As the court of appeals correctly explained, the rule of lenity is reserved for those cases in which the statute as written is ambiguous. Pet. App. 43 & n.15; *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 806 (1994); *Smith* v. *United States*, 113 S. Ct. 2050, 2059-2060 (1993). Here, the statutory text contains no "nudity" requirement, and the legislative history confirms that Congress rejected such an express nudity test. The rule of lenity does not justify reading into a statute a non-textual limitation that Congress plainly discarded.

2. Petitioner contends (Pet. 22-26) that he lacked the mental state necessary to violate Section 2252 because he reasonably believed that his possession of the videotapes was legal. That claim is without merit.

The federal child pornography statute requires proof that a defendant "knowingly" transported or shipped, or "knowingly" received or possessed, visual depictions of a minor engaging in "sexually explicit conduct." 18 U.S.C. 2252 (1988 & Supp. V 1993). The courts of appeals have consistently held that the defendant has knowledge that he is dealing with materials containing visual depictions of sexually explicit conduct when he is shown to know the nature and content of the materials. See *United States* v. *Cochran*, 17 F.3d 56, 60-61 (3d Cir. 1994), petition for cert. pending, No. 93-8697; *United States* v. *Osborne*, 935 F.2d 32, 34 & n.2 (4th Cir. 1991); *Rodriguez* v. *Clark Color Labs.*, 921 F.2d 347, 349 (1st Cir. 1990); *United States* v. *Duncan*, 896 F.2d 271, 277-278 (7th Cir. 1990); *United States* v. *Moncini*, 882 F.2d 401, 404 (9th Cir. 1989); *United States* v. *Brown*, 862 F.2d 1033, 1036-1038 (3d Cir. 1988); *United States* v. *Johnson*, 855 F.2d 299, 306 (6th Cir. 1988).

Under the applicable standard, there can be no question that petitioner "knowingly" possessed the proscribed materials. Petitioner does not contend that he was mistaken—reasonably or otherwise—with respect to the contents of the videotapes.[6] He argues

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[6] In *United States* v. *X-Citement Video, Inc.*, No. 93-723 (argued Oct. 5, 1994), this Court recently heard argument on the question whether Section 2252 requires knowledge of the minority of the performer who is engaged in sexually explicit conduct. Petitioner does not argue that he was unaware that the girls on his videotapes were minors. Any such claim would be meritless, in light of Nather's advertising (which advised, for example, that the videotape featured "undies on girls between the ages of 8 and 16,"

instead that he reasonably believed their possession to be lawful. But "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). This Court has applied that rule to the federal obscenity statutes, *Hamling* v. *United States*, 418 U.S. 87, 123 (1974), and the reasoning of that decision applies equally in the related context of child pornography. See Pet. App. 49-50; see also *United States* v. *Cochran*, 17 F.3d at 59; *United States* v. *Moncini*, 882 F.2d at 405-406. As this Court explained in *Hamling*, it is sufficient that the defendant had knowledge of the nature of the materials; he need not be shown to know that they were illegal.[7]

In light of the explicit descriptions of the materials petitioner ordered, and the findings of both courts below that he was aware of their nature and contents, petitioner "must bear the risk of the potential illegality of his conduct." *United States* v. *Moncini*, 882 F.2d at 405. A contrary rule, this Court has recognized, "would permit the defendant to avoid prosecution by simply

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see 11/14/91 Tr. 4-5; GX 1) and petitioner's own notes on the boxes for the videos (which noted, *inter alia*, that *Ripe and Tender* showed a "10 yr. old in sexy swimsuit poses." 8/28/91 Tr. 46; GX 3.) Nor does petitioner contend that he lacked knowledge of any other fact that bore on the legality of his conduct.

[7] Petitioner relies (Pet. 24) on *United States* v. *United States District Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), in which the court of appeals held that a defendant charged with the production of child pornography in violation of 18 U.S.C. 2251 was entitled to an affirmative defense based on a reasonable mistake of age. Whatever the merits of its holding, the court of appeals in that case did not recognize a mistake of law defense. Rather, the court held that a defendant who reasonably lacked knowledge of a legally dispositive *fact* was entitled to acquittal on that basis.

claiming that he had not brushed up on the law." *Hamling*, 418 U.S. at 123; see also *Rosen* v. *United States*, 161 U.S. 29, 41-42 (1896).

3. Finally, petitioner contends (Pet. 25-30) that as construed by the Third Circuit the federal child pornography statute is unconstitutionally vague and overbroad.

a. Petitioner does not assert that his own videotapes are constitutionally protected, and they clearly are not. *New York* v. *Ferber*, *supra*. Rather, he relies (Pet. 26-28) on the First Amendment overbreadth doctrine. That doctrine, as the Court noted in *Ferber*, is one of the few exceptions to the traditional principle that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." 458 U.S. at 767. The overbreadth doctrine is "strong medicine" that should be employed "only as a last resort." *Id.* at 769 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)).

The federal child pornography statute is not unconstitutionally overbroad. The requirement that an exhibition of a minor's genitals be "lascivious" ensures that the overwhelming majority of depictions covered by the statute have no protection under the First Amendment. If there are any "lascivious exhibition[s]" of a minor's genital and pubic areas that are protected under the Constitution, there certainly cannot be many; typical pictures taken at gymnastic meets or dance performances (Pet. 26-27) would not be found to be "lascivious." As this Court explained in *Ferber*, in upholding New York's child pornography statute, a prohibition of the "lewd exhibition of the genitals" does not violate overbreadth principles, even if it would arguably be impermissible to apply the statute to medical

textbooks or National Geographic photographs. 458 U.S. at 751. Like the New York statute upheld in Ferber, this is "the paradigmatic case of a * * * statute whose legitimate reach dwarfs its arguably impermissible applications," 458 U.S. at 773, and the overbreadth challenge therefore fails.

b. For similar reasons, petitioner's vagueness challenge (Pet. 28-30) also fails. This Court in Ferber rejected virtually the same vagueness claim that petitioner advances. As the Court noted, "[t]he term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller* [v. *California*, 413 U.S. 15 (1973)] as an example of a permissible regulation." *Ferber*, 458 U.S. at 765; *Osborne* v. *Ohio*, 495 U.S. at 114. The absence of a nudity requirement does not render the statute vague.

Petitioner claims (Pet. 29) that the statute could conceivably be applied to depictions of minors in leotards, bathing suits, and underwear found in newspapers, magazines, clothing catalogues, and art exhibits. The court of appeals made clear, however, that the statute does not reach visual depictions unless they are "lascivious," and "[o]nly a minuscule fraction of all pictures of minor children will be sufficiently sexually suggestive and unnaturally focused on the genitalia to qualify as lascivious." Pet. App. 46. The court also observed that "[e]ven fewer images where a minor's genital area is not fully exposed will constitute lascivious exhibitions since the fact that a child's genital area is covered is a factor militating against a finding of lasciviousness." *Ibid.* In light of those comments and judicial experience in applying the *Dost* factors (see note 1, *supra*), petitioner's

claim (Pet. 29-30) that the statute has an unpredictable and limitless scope is incorrect.[8]

In this case, it should have come as no surprise to petitioner that his tapes would be found to constitute unlawful depictions of minors engaged in sexually explicit activity. Petitioner's sexually suggestive tapes focused unnaturally on the genitals of young girls who were posed in provocative ways and dressed to enhance that effect. "In several sequences, the minor subjects, clad only in very tight leotards, panties, or bathing suits, were shown specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer. In some of those poses, the child subject was shown dancing or gyrating in a fashion indicative of adult sexual relations." Pet. App. 33. Petitioner did not dispute that his tapes were lascivious, and he admitted that they were "designed to elicit a sexual response in the viewer." 11/14/91 Tr. 19. The statute gave petitioner fair warning that his tapes depicted "exhibition[s] of the genitals or pubic area[s]" of minors within the meaning of 18 U.S.C. 2256(2)(E).

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[8] Many courts have applied the *Dost* factors, or a close variation, in construing the statute. See *United States* v. *Arvin*, 900 F.2d 1385, 1390-1391 & n.4 (9th Cir. 1990), cert. denied, 498 U.S. 1024 (1991); *United States* v. *Wolf*, 890 F.2d 241, 244-245 (10th Cir. 1989); *United States* v. *Villard*, 885 F.2d 117, 122 (3d Cir. 1989); *United States* v. *Rubio*, 834 F.2d 442, 447-448 (5th Cir. 1987); *United States* v. *Nolan*, 818 F.2d 1015, 1019 n.5 (1st Cir. 1987). Those factors provide consider-able guidance in determining whether a particular visual depiction violates the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-413

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN A. KNOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS IN OPPOSITION TO CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. Whether there can be a "lascivious exhibition of the genitals or pubic area" when a child's genitals are scantily covered and a camera focuses on those areas for extended periods in order to produce an image arousing to pedophiles.

2. Whether this Court's previous decisions are correct that child pornography statutes defined to include "lewd" or "lascivious" exhibitions of the genitals or pubic area are not unconstitutionally vague or overbroad.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-413

STEPHEN A. KNOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS IN OPPOSITION TO CERTIORARI

INTEREST OF AMICI CURIAE

With the written consent of the parties, this brief is filed on behalf of "Amici Members of Congress," the 238 United States Senators and Representatives and the two Representatives-Elect listed in Appendix A. As parents, community leaders, and legislators, each of the 240 Amici Members has furthered and benefited from federal policies aimed at eliminating child pornography from our society. The Amici Members coalesced as a group when it became apparent that the Department of Justice was unwilling to prosecute pedophiles caught using certain types of child pornography. The core question at issue, as identified by the court of appeals, is whether federal child pornography laws are to be read "to

create an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered." *United States v. Knox*, 977 F.2d 815, 823 (3rd Cir. 1992). Starting with their brief before this Court and continuing in the proceedings on remand, the Justice Department favored a form of such immunity. By contrast, the Amici Members of Congress consistently have opposed making any exception for lascivious exhibitions of barely covered genitals.

On remand from this Court, the Justice Department, while unwilling to drop its case against petitioner Knox, still declined to prosecute it vigorously. The court of appeals responded by ordering participation in oral argument by counsel for Amici Members of Congress, as the spokesperson for the various amici who urged affirmance of defendant Knox's conviction. Of the positions presented at argument—Knox's, the Department's, and that of the Amici Members—only the Amici Members' was adopted by the court. Should this Court grant certiorari despite this Brief in Opposition, the Amici Members will solicit leave of the Court to serve again as surrogate prosecutors in the same manner as in the proceedings below.

STATEMENT OF THE CASE

Petitioner Stephen A. Knox (petitioner or Knox) is a repeat offender under the child pornography laws. Convicted once before of receiving child pornography, he was convicted again in this case on one count of knowingly receiving through the mail visual depictions of a minor engaging in sexually explicit conduct, and a second count of knowingly possessing such visual depictions. *See* 18 U.S.C. 2252(a)(2) & (4)(B). After a bench trial, the district court sentenced Knox to concurrent terms of five years imprisonment on each count.

The facts in this case are not in dispute. In March 1991, the U.S. Customs Service intercepted an order from a French company for two videos, "Little Girl Bottoms (Underside)" and "Little Blonds." The order requested that the videos be sent to

"J. Richard Scott," to be paid for by a check drawn on an account belonging to Knox. That same month, the Customs Service intercepted a mailing addressed to J. Richard Scott from the Netherlands containing a catalog advertising videotapes depicting minors who were nude and seminude. The Customs Service, aware that Knox previously had been convicted of receiving child pornography, obtained a search warrant and conducted a search of Knox's apartment.

Agents thereupon seized the three videotapes which ultimately formed the basis for Knox's conviction. The videotapes, each around 90 minutes in length, were compilations of videos sold by the Nather Company of Las Vegas. They depicted girls as young as 7 or 8 years old, typically wearing bathing suits or leotards, or spreading their legs so that their panties were visible under a short skirt. The district court was able to describe the tapes graphically after viewing only short portions of them: "In each vignette the subject of the video would strike various poses which were obviously being directed by someone off-camera. Whenever a particular pose revealed the girl[']s underpants or the area surrounding her genitals, the camera would zoom in on the area. In the course of each vignette, more than a substantial amount of time was spent focusing in on these areas, as well as the girl's buttocks." *United States v. Knox*, 776 F. Supp. 174, 179 (M.D. Pa. 1991).

While none of the girls in the videotapes was actually nude, they were directed to strike obviously unnatural and physically uncomfortable poses. For instance, in one segment, a girl who appears to be about 8 years old is standing on a stairway wearing nothing but a tight bikini bathing suit. She is facing down the stairs, toward the camera, which is positioned at the bottom of the stairs. Apparently at the direction of someone off camera, she stretches her left leg high enough to place it on the bannister. The camera then zooms in on her genital area, which remains the camera's exclusive focus for an extended period of time .

In another representative segment, two little girls are sitting on a wooden bench. They are wearing plaid skirts and blouses. One of the girls turns sideways on the bench and pulls her knees up to her chest. The photographer, apparently by lowering the camera to the floor and shooting up, videotapes long segments where nothing is visible except the child's panties, focusing on her pubic area. Because of the awkward position and angle of the camera, the child must have been aware of the focus of the shot—that only her genital area and not the girl herself was being videotaped.

While petitioner goes to great lengths trying to claim that these materials contain nothing but wholesome, everyday depictions of little girls, a more apt description is found in a catalog from the Nather Company, seized from petitioner's apartment with checkmarks (presumably petitioner's) noting several of the videotape selections:

> "Sassy Sylphs" will blow your mind so completely you'll be begging for mercy.
>
> Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better).

United States v. Knox, 32 F.3d at 738.

Based on videotapes meeting this description, Knox was charged with receiving and possessing child pornography in violation of 18 U.S.C. 2252. He moved unsuccessfully to dismiss the indictment before trial on the ground that the videos did not contain a "lascivious exhibition" of the "genitals or pubic area" as required by 18 U.S.C. § 2256(2)(E).

Before the Third Circuit, Knox again argued that his conviction should be overturned because the children in the

videos were not actually nude. The court of appeals, "declin[ing] to create an absolute immunity for pornographers who pander to pedophiles by using as their subjects children whose genital areas are barely covered," rejected Knox's argument. 977 F.2d at 823. Specifically, the court held that the statutory text and legislative history both convincingly demonstrate that "exhibition" encompasses conduct which "present[s] to view" or "put[s] on display in order to attract notice." 977 F.2d at 820. The court found that this standard was met easily where "the obvious purpose and inevitable effect of the videotape was to 'attract notice' specifically to the genitalia and pubic area." *Id.* The legislative history reinforced the court's conclusion that the child's pubic area does not have to be nude to be "exhibited". By including and then eliminating the word "nudity" from the statutory text, the court reasoned that Congress had demonstrated its intent to repudiate any such limitation. 977 F.2d at 821.

Finally, the court emphasized that the "underlying rationale for the federal child pornography laws also supports the conclusion that clothed exhibitions of the genitalia are proscribed." *Id.* The court recognized that "[t]he harm Congress attempted to eradicate by enacting the child pornography laws," *i.e.*, treating children as sexual objects and risking their permanent emotional scarring, "is present when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." The court concluded that the "rationale underlying the statute's proscription applies equally to any *lascivious* exhibition of the genitals or pubic area whether these areas are clad or completely exposed." 977 F.2d at 822.

On certiorari, Knox renewed his contention that only nude depictions may be prosecuted, and this Court granted his petition. *Knox v. United States*, 113 S.Ct. 2926 (1993). While Knox's case was before the Court, the Department of Justice radically changed its position, much to the dismay of the Amici

Members of Congress and the public who overwhelmingly support vigorous enforcement of the child pornography laws. Thus, despite having brought Knox's indictment, secured his conviction, defended that conviction before the court of appeals, and opposed certiorari, the Department's brief on the merits adopted an interpretation strikingly similar to the one Knox himself had taken from the outset. Citing the statute's "plain meaning," the Department argued that its reach must be limited to exhibitions which "focus on [the genitals]" and "render them visible," in the sense "that the body parts themselves [are] discernible either through or beneath the clothing." (Resp. S. Ct. Br. I at 9-11) Arguably going even beyond Knox's position, the Department further maintained that "the material must depict a *child lasciviously engaging* in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)." (*Id.* at 9) (emphasis added)

On the basis of its newly-minted interpretation, the Department requested that the Court remand either to the court of appeals or to the district court "for application . . . of the correct standard to the facts of this case." (*Id.* at 20) This Court granted the Department's request on November 1, 1993, and remanded to the court of appeals "for further consideration in light of the position asserted by the Solicitor General." *United States v. Knox*, 114 S. Ct. 375 (1993).

On remand, the Department first sought a further remand to the district court. When the court of appeals ordered full briefing instead of the requested remand, the Department partially backed away from the position advocated in its Supreme Court merits brief. While still maintaining that the statute proscribes only depictions where "the contours of the genital area are clearly visible," Gov't brief on remand at 13, it withdrew the second element of the test that it announced before this Court—specifically, that the child must be acting lasciviously. The incongruity of the Department's discernability requirement ultimately forced its counsel to

concede at oral argument in the court of appeals that "little girls [would be] at more of a risk than little boys under its interpretation." Tr. at 39.

The court of appeals reconsidered on remand all of the issues that had been raised in the initial appeal, as well as the additional questions presented by the Justice Department. The Amici Members of Congress figured prominently both in briefing and oral argument before the court of appeals.

In another lengthy opinion, the court of appeals unanimously affirmed Knox's conviction. *United States v. Knox*, 32 F.3d 733 (3d Cir. 1994). The court rejected both Knox's "nudity" requirement and the Justice Department's "discernability" requirement after giving further consideration to "the statutory language, legislative history, the purpose of Congress in passing the federal child pornography statute, and the Solicitor General's brief submitted in the Supreme Court." *Id.* at 754. In the court's view, a 'lascivious exhibition of the genitals or pubic area' . . . encompasses visual depictions of a child's genitals or pubic area even when these areas are covered by an article of clothing and are not discernable." The court also addressed and rejected petitioner's constitutional attacks on the statute. *Id.* at 751-52.

REASONS FOR DENYING THE WRIT

Notwithstanding the contrary implication in Knox's Petition (*see* Cert. Pet. II at 9), the previous grant of certiorari should not influence the Court's decision whether to grant certiorari a second time. There is no conflict among the circuits regarding either the Third Circuit's holding or its interpretation of the child pornography laws. Nor are there any other bases on which review should be granted. The statute, as interpreted by the Third Circuit, is constitutional in light of this Court's decisions in *New York v. Ferber*, 458 U.S. 747 (1982) and *Osborne v. Ohio*, 495 U.S. 103 (1990) and petitioner Knox was properly convicted on the evidence presented.

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER CIRCUITS OR THIS COURT.

The traditional grounds for granting certiorari are entirely absent here. There is no disagreement among the circuits on the question presented. Indeed, no other court of appeals has even considered—much less contradicted—the Third Circuit's statutory analysis. The petition for certiorari not only admits but trumpets this conclusion: "[t]he fact remains that Petitioner Knox is the only person ever to be convicted for receiving and possessing depictions of minors whose genitals and pubic areas are fully covered . . .." *See* Cert. Pet. II at 10.

Even where the Court appreciates "the importance of the underlying issues," it is often "a sound exercise of discretion" for it to withhold review until an "issue receives further study" in the lower courts. *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.). Justice Stevens' admonition in *McCray*, prompted by the Court's denial of review in three cases presenting the issue eventually decided in *Batson v. Kentucky*, 476 U.S. 79 (1986), applies *a fortiori* here. Surely plenary review by this Court aimed at defining the reach of the term "lascivious exhibition" is not so important as the systemic issue posed in *McCray* and *Batson*—whether jurors in criminal cases may be excluded by preemptory challenge on the basis of race. Moreover, the trio of cases on which review was denied in *McCray* necessarily contained more varied perspectives on the relevant issues than does the single unanimous opinion that petitioner would have the court review in this case.

Petitioner's one attempt to discern a conflict of sorts turns solely on the Third Circuit's application of the factors bearing on "lascivious exhibition," first announced in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub. nom. United States v. Weigand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987) (emphasis added). *See* Cert.

Pet. II at 18-20. But there is no conflict among the circuits on the *Dost* factors; instead, every circuit that has considered the issue seems to accept them. *See, e.g., United States v. Arvin*, 900 F.2d 1385, 1390-91 & n.4 (9th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991); *United States v. Wolf*, 890 F.2d 241, 244-46 (10th Cir. 1989); *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987) (discussing the six *Dost* factors without citing to the *Dost* case); *United States v. Nolan*, 818 F.2d 1015, 1019 n.5 (1st Cir. 1987); *United States v. Mr. A.*, 756 F. Supp. 326, 328-29 (E.D. Mich. 1991). Petitioner's claim that the Third Circuit applied the factors in the context of deciding what constitutes an "exhibition" rather than a "lascivious exhibition" is a distinction without a difference.

Moreover, the *Dost* factors applied by the Third Circuit and other courts are entirely appropriate under this Court's decisions. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court recognized that the purpose of child pornography statutes prohibiting "actual or simulated . . . lewd exhibition of the genitals" is to protect children from permanent damage to their "physiological, emotional, and mental health." *Id.* at 758, 761. Recognizing this special concern, the Court held that the material in question need not be obscene under *Miller v. California*, 93 S.Ct. 2607 (1973), *Ferber* at 756, and that, in determining which materials are proscribed, a balancing of considerations is constitutionally permissible. *Id.* at 764-765. *Dost* simply follows *Ferber* by enunciating six factors to guide the determination of whether a visual depiction constitutes a "lascivious exhibition of the genitals or pubic area." *See* 18 U.S.C. § 2256(2)(E). Since there is no conflict over the application of those factors, and since they are constitutionally permissible under this Court's decisions, there is no basis for granting certiorari here.

II. THE COURT'S EARLIER GRANT OF CERTIORARI HAS NO BEARING ON WHETHER CERTIORARI SHOULD BE GRANTED A SECOND TIME.

There is no basis for a presumption that certiorari should be granted again simply because the Court previously granted review. Indeed, our research shows that this Court generally has denied second petitions for certiorari on the same issue after remand of criminal cases at the suggestion of the Solicitor General. To be sure, cases where the lower court squarely addressed the remanded issue and reaffirmed on the same or similar grounds are extremely rare. But where that occurred, the Court has not hesitated to deny certiorari when the case comes to it a second time. *See United States v. Stanley*, 427 F.2d 1066 (9th Cir.), *vacated and remanded*, 400 U.S. 936 (1970), *on remand*, 446 F.2d 347 (9th Cir. 1971).

Counsel for the Amici Members performed a computerized search of cases pending before the Court but subsequently remanded either at the suggestion of the Solicitor General, or because the Solicitor General changed his legal position. Without any claim that our research is perfect or our search exhaustive, the results are nonetheless instructive.

Instances where a second petition for certiorari was filed *on any issue* after remand for reconsideration in light of the Solicitor General's changed position are themselves relatively rare. Between 1930 and November 1, 1993 (the date of remand to the Third Circuit here), the Court vacated and remanded approximately 125 cases in response to a suggestion or a confession of error by the Solicitor General. Most of the remanded cases were criminal. In sixteen such cases, a second petition for certiorari was filed following remand to the lower court. Fifteen of these sixteen cases were criminal. And in all fifteen criminal cases, the second petition for certiorari was denied.

In twelve of the fifteen criminal cases where a second petition was filed, the issue was resolved, or the error corrected

in favor of the petitioner (uniformly the criminal defendant).[1] Consequently, in each of these twelve cases, the second petition for certiorari did not involve the same issue or issues on which certiorari had previously been granted.

In the remaining three criminal cases, the second petition for certiorari *did* involve the same issue or issues. But in two of those three cases, the court of appeals affirmed its previous decision by means that did not address precisely the

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[1] *United States v. Al Kashif*, 930 F.2d 35 (10th Cir. 1991), *vacated and remanded*, 112 S.Ct. 412 (1991), *aff'd*, 951 F.2d 1261 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1597 (1992); *Chappell v. United States*, 878 F.2d 384 (7th Cir. 1989), *vacated and remanded*, 494 U.S. 1075 (1990), *dismissal of habeas corpus aff'd*, 956 F.2d 272 (7th Cir. 1992), *cert. denied*, 112 S.Ct. 1986 (1992), *rehearing denied*, 112 S.Ct. 3061 (1992); *United States v. Petty*, 798 F.2d 1157 (8th Cir. 1986), *vacated and remanded*, 481 U.S. 1034 (1987), *rev'd and remanded*, 828 F.2d 2 (8th Cir. 1987), *cert. denied*, 486 U.S. 1057 (1988); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *aff'd in part, rev'd and remanded in part*, 591 F.2d 278 (5th Cir. 1979), *cert. denied*, 444 U.S. 864 (1979); *United States v. Haddad*, 571 F.2d 583 (6th Cir. 1977), *vacated and remanded*, 434 U.S. 1057 (1978), *on remand*, 587 F.2d 12 (6th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979); *United States v. Gilbert*, 537 F.2d 118 (5th Cir. 1976), *vacated and remanded*, 430 U.S. 902 (1977), *rev'd in part*, 553 F.2d 990 (5th Cir. 1977), *appeal after remand*, 573 F.2d 346 (5th Cir. 1978), *cert. denied*, 439 U.S. 913 (1978); *United States v. Beasley*, 519 F.2d 233 (5th Cir. 1975), *vacated and remanded*, 425 U.S. 956 (1976), *on remand*, 535 F.2d 293 (5th Cir. 1976), *appeal after remand*, 576 F.2d 626 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979); *United States v. Graham*, 521 F.2d 812 (5th Cir. 1975), *vacated and remanded sub. nom. Riggins v. United States*, 425 U.S. 956 (1976), *on remand*, 563 F.2d 1264 (5th Cir. 1977), *cert. denied*, 439 U.S. 848 (1978); *United States v. Ketola*, 455 F.2d 83 (9th Cir. 1972), *vacated and remanded*, 409 U.S. 815 (1972), *on remand*, 478 F.2d 64 (9th Cir. 1973), *cert. denied*, 414 U.S. 847 (1973); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), *vacated and remanded*, 392 U.S. 651 (1968), *on remand*, 397 F.2d 812 (8th Cir. 1968), *appeal after remand*, 434 F.2d 325 (8th Cir. 1970), *cert. denied*, 401 U.S. 949 (1971); *Murray v. United States*, 333 F.2d 409 (10th Cir. 1964), *vacated and remanded*, 380 U.S. 527 (1965), *on remand*, 351 F.2d 330 (10th Cir. 1965), *cert. denied*, 383 U.S. 949 (1966); *Evans v. United States*, 113 F.2d 935 (10th Cir. 1940), *vacated and remanded*, 312 U.S. 651 (1941), *on remand*, 122 F.2d 461 (10th Cir. 1941), *cert. denied*, 314 U.S. 698 (1942).

issue which this Court previously had remanded at the suggestion of the Solicitor General. In *United States v. Gaines*, for example, this Court had remanded to the court of appeals to consider the validity of an arrest and search, but the lower court applied the concurrent sentence doctrine to hold that it was not required to reach that issue.[2] In the second case, *United States v. Williams*, this Court remanded for reconsideration on the issue of the standard of review to be applied in a probable cause determination.[3] The court of appeals held on remand that it was bound by circuit precedent, but that, in any event, changing the standard of review would not change the outcome.

In the final case, *United States v. Stanley, supra*, the lower court (like the Third Circuit here) squarely addressed and reaffirmed its previous decision on the remanded legal issue—in *Stanley*, whether consecutive sentences for possession and manufacture of LSD were permissible. The Court in *Stanley* denied the subsequent certiorari petition without explanation, 404 U.S. 996 (1971), *reh'g denied*, 406 U.S. 911 (1972). This is the sole, on-all-fours precedent uncovered by Amici Members' research, but it is surely enough to defeat petitioner's implicit suggestion that a second certiorari petition on the same issue will be granted as a matter of course.[4]

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[2] *United States v. Gaines*, 441 F.2d 1122 (2d Cir.), *vacated and remanded*, 404 U.S. 878 (1971), *on remand*, 460 F.2d 176 (2d Cir. 1972), *cert. denied*, 409 U.S. 883 (1972).

[3] *United States v. Williams*, 916 F.2d 714 (6th Cir. 1990), *vacated and remanded*, 500 U.S. 901 (1991), *aff'd*, 949 F.2d 220 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 2308 (1992).

[4] In two civil cases—one within the date parameters of our search and one outside them—this Court granted a second petition. In *Banco Nacional de Cuba v. First National City Bank of New York*, where the court of appeals squarely addressed the remanded legal issue and affirmed its previous decision on the same grounds, this Court granted a second petition for certiorari. 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd* 431 F.2d 394 (2d Cir.

(continued...)

III. THE COURT OF APPEALS WAS CORRECT AS A MATTER OF LAW ON EVERY DISPUTED ISSUE.

As demonstrated above, none of the traditional bases for certiorari apply here. Nor should the Court's prior grant of review influence the decision whether to grant review a second time. The following discussion summarizes briefly why no injustice will result if certiorari is denied.

A. The Court Below Correctly Interpreted The Statute.

The court of appeals correctly decided every disputed legal issue, both in its initial opinion and on reconsideration after remand from this Court. As the court observed during the oral argument on remand, "at the heart of the case is the question as to whether or not the statute requires or does not require nudity." As its title indicates, the Protection of Children Against Sexual Exploitation Act was expressly designed to promote the welfare of children by protecting them from the permanent emotional scarring that can result from being sexually exploited. Pub. L. No. 98-292, § 2(2), (3), ("thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and the use of children as subjects of pornographic materials is harmful to the physiological,

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[4] (...continued)
1970), *vacated and remanded*, 400 U.S. 1019 (1971), *on remand*, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 406 U.S. 759 (1972) (at issue was whether the act of state doctrine bars consideration of a defensive counterclaim or offset). Similarly, last Term the Court decided *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1589 (1994), a case which it had earlier remanded to the court of appeals after the EPA issued a memorandum directing EPA administrators to treat certain waste at issue as exempt from regulation, a position that, if adopted by the Court, would have been dispositive. On remand the court of appeals reinstated its previous opinion, holding that the material was subject to regulation, notwithstanding the EPA's position, and this Court again granted certiorari.

emotional, and mental health of the individual child and to society"). The court below recognized that whether a child is clothed or unclothed has little bearing on the emotional scarring and psychological harm inflicted on a child who is victimized through pornographic exploitation. *See* 32 F.3d at 750 ("when a photographer unnaturally focuses on a minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles [t]he child is treated as a sexual object and the permanent record of this embarrassing and humiliating experience produces the same detrimental effects to the mental health of the child as a nude portrayal.")

The mental scarring of children that the statute was intended to prevent takes place whenever children are made to see themselves as pedophiles see them—as mere sexual objects who exist to provide sexual pleasure to adults. That exploitation and eroticization does not depend on whether the child is naked, partially clothed, or clothed with "discernable parts." *See, e.g., United States v. McCormick*, 675 F. Supp. 223, 224 (M.D. Pa. 1987) (photos of a *partially clothed* girl constituted an "exhibition" under 18 U.S.C. § 2252 and 18 U.S.C. § 2256 where the "pictures featured the child photographed as a sexual object. . . . [L]asciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience. . ..")

Nor is nudity or discernability required to implicate Congress's other concern in enacting the statute: ending the exploitation of children who are forced *to view* child pornography. As the Third Circuit noted, Congress judged that only by "controlling the production and dissemination of child pornography" would it be possible to curb the behavior of "pedophiles [who] often use child pornography to seduce other children into performing sexual acts." 977 F.2d 822. This objective can be achieved only by outlawing *all* depictions of children in which "a photographer unnaturally focuses on a

minor child's clothed genital area with the obvious intent to produce an image sexually arousing to pedophiles." *Id.*

Significantly, Congress extended the definition of "lascivious exhibition of the genitals or pubic area" to include "actual *or simulated*" lascivious exhibitions. 18 U.S.C. § 2256(2) (emphasis added). The plain implication of this language (a "simulated lascivious exhibition") substantially broadens the practical reach of the statute, and demonstrates Congress's intent that the statute proscribe *all types* of exhibitions, not just those that are graphic, explicit, or nude.

Further, the plain meaning of the term "exhibit" confirms that the statute reaches exhibitions of clothed genitalia. In drafting laws, Congress is presumed to speak as a natural English speaker would, and its words are to be given the interpretation that they would be given in common, everyday conversation. *Perrin v. United States*, 444 U.S. 37, 42 (1992). As the court of appeals recognized, "[i]n ordinary legal usage, the word 'exhibit' means 'to show or display; to offer or present for inspection.' The genitals . . . need not be fully or partially nude in order to be shown or put on display." 32 F.3d at 744, *citing* Black's Law Dictionary at 573 (6th ed. 1990). Had Congress wanted to proscribe only nude or discernable depictions, it presumably would have chosen a phrase that accurately reflected that purpose, such as "lascivious *exposure* of the genitals."

Finally, the legislative history reinforces Congress's purpose and the plain meaning of the words it chose. In enacting this legislation, Congress explicitly considered—and then rejected—a provision which would have proscribed only nude depictions of children. *See* S. Rep. No. 1011, 95th Cong., 2d Sess. (1977). Congress's failure to use a particular word after that word was deliberately considered and then passed over, as the word "nudity" was in this case, indicates a specific intention to abandon that word in favor of another. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 205-206 (1962), *overruled on other grounds, Boys Market, Inc. v. Retail Clerks*

Union, 398 U.S. 235, 254 (1970) (congressional purpose evident where the legislative history showed that Congress actually considered certain language and that the language was "dropped" and never became law); *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U.S. 355, 363 (1949) (argument based on omitted wording rejected on the basis of legislative history). As the Court below has pointed out, "[b]y subsequently eliminating the word 'nudity,' Congress appears to have repudiated its earlier intention to confine the statute's coverage to nude exhibitions." 977 F.2d at 821.

In short, had Congress wished to include a nudity requirement in the Protection of Children Against Sexual Exploitation Act, it could have easily done so by retaining the word "nudity" or by employing "expose" instead of "exhibit." The Act's legislative history demonstrates that such provisions were consciously omitted by Congress because the Act was designed to prevent the sexual exploitation of children, whatever form it might take, and in whatever state of dress or undress a child might appear.

B. Applying The Statute To Lascivious Exhibitions Where Genitalia Are Covered And Not Discernable Does Not Render It Unconstitutional.

Knox contends that by construing the statute to reach clothed exhibitions of the genital or pubic area, it is rendered facially overbroad or unconstitutionally vague. (Cert. Pet. II at 26-30) Under this Court's established guidelines, however, the statute is neither facially vague or overbroad nor vague as applied to prohibit lascivious exhibitions of clothed genital or pubic areas.

In order to invalidate a statute on overbreadth grounds, "the overbreadth of [the] statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 614-615 (1973). Further, in determining whether a statute is

overbroad, authoritative pronouncements determining the breadth of the statute must be considered. *Id.* at 618.

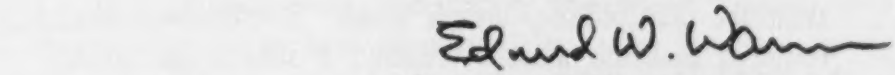
This Court has upheld statutes with virtually identical language against claims of overbreadth. *See New York v. Ferber*, 458 U.S. at 771, 772-773 (law prohibiting the "lewd exhibition of the genitals" of children not unconstitutionally overbroad; requirement of substantial overbreadth extends to criminal prohibitions, and a facial overbreadth challenge requires that the statute "reach[] a substantial number of impermissible applications."); *Osborne v. Ohio*, 495 U.S. 103, 113, *reh'g denied*, 486 U.S. 913 (1990) (statute that had been construed to prohibit "a lewd exhibition or . . . graphic focus on the genitals" not unconstitutionally overbroad).

Nor is the statute unconstitutionally vague. In determining whether statutes are facially vague, this Court's decisions look to whether the statute sets reasonably clear guidelines for law enforcement officials and triers of fact, as well as provides fair notice or warning regarding what conduct is prohibited. *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2731 (1991); *Parker v. Levy*, 417 U.S. 733, 752 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972). While obscenity statutes unavoidably are not models of precision, that "lack of precision is not itself offensive to the requirements of due process." *Roth v. United States*, 354 U.S. 476, 491, *reh'g denied*, 355 U.S. 852 (1957) (interpreting the phrase "obscene, lewd, lascivious, or filthy"); *Hamling v. United States*, 418 U.S. 87, 112 (1974) (the phrase "obscene, lewd, lascivious, indecent, filthy or vile"). "[A]ll that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *Roth, supra*, at 491.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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APPENDIX

APPENDIX A

AMICI MEMBERS OF CONGRESS

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No. 94-413

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., APERTURE FOUNDATION, INC., FREEDOM TO READ FOUNDATION, MAGAZINE PUBLISHERS OF AMERICA, AMERICAN CIVIL LIBERTIES UNION, AND LAW & HUMANITIES INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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No. 94-413

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STATEMENT

The American Booksellers Foundation for Free Expression, the Council for Periodical Distributors Associations, the National Association of Artists' Organizations, the Periodical and Book Association of America, Inc., Aperture Foundation, Inc., the Freedom to Read Foundation, the Magazine Publishers of America, the American Civil Liberties Union and the Law & Humanities Institute submit this joint brief urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both Petitioner and Respondent, which are submitted herewith.

THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and to educate booksellers, other members of the book industry and the public about the dangers of censorship, and to promote and to protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 330 independent local wholesale distributors who distribute over 95% of all magazines in every state of the United States, as well as comic books, paperback books and newspapers.

The National Association of Artists' Organizations ("Artists' Organizations") is a not-for-profit, membership service organization dedicated to serving and promoting non-profit organizations engaged in the presentation and support of new and contemporary work on the visual, performing, literary, media, and interdisciplinary arts. Artists' Organizations' members constitute the primary presenters, supporters and makers of new and evolving art in America.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who

distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada, for ultimate sale to the public, principally at newsstands.

Aperture Foundation, Inc. ("Aperture"), a not-for-profit corporation, was founded over forty years ago by Ansel Adams, Dorothea Lange, Minor White and others to foster the fine art of photography. Aperture is dedicated to the presentation of distinguished historical and contemporary photography and to the study of new photographic media, through publishing, exhibitions, research, education and preservation.

The Freedom to Read Foundation ("FTR") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Magazine Publishers of America ("MPA") is a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers, representing almost 800 general interest consumer magazines, ranging from journals of literature to special interest publications to multi-million circulation publications.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members, dedicated to the protection and promotion of individual rights and liberties, primary among them the freedom of speech. Most of the ACLU's members are purchasers, readers, and viewers of books, magazines and films. In 1991, the ACLU established an Arts Censorship Project specifically to combat increasing threats of censorship in the United States, including often overzealous enforcement of laws relating to information or creative expression about human sexuality.

The Law & Humanities Institute ("LHI") is a worldwide, not-for-profit organization consisting of scholars, writers, lawyers, literary critics and other creative persons who seek to strengthen the relations between law and the humanities. LHI monitors and opposes developments in the law that threaten freedom of expression of creative artists, other humanists and their creative imagination.

INTEREST OF THE *AMICI* AND REASONS FOR GRANTING THE WRIT

Aperture Foundation and members of the *amici* other than the FTR, ACLU and LHI publish, produce, distribute and sell books, magazines, videos, works of art and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. *Amici's* members do not own what are commonly referred to as adult retail stores; nor do they distribute the adult materials that are generally found in such stores. *Amici's* members do, however, create, distribute and sell mainstream materials that may include photographs or depictions of clothed teenagers and younger children in poses that may, in light of the Third Circuit's expansive holding, be considered lascivious exhibitions. The ACLU's and LHI's members are readers, viewers and acquirers of such material. Libraries and librarians represented by FTR provide such materials to readers and viewers. Because *amici's* members include artists, distributors, booksellers and librarians who create, distribute, sell and loan popular and potentially provocative books, periodicals and art, and the persons who purchase them, *amici* have a significant interest in the resolution of the issue before the Court.

Sexual exploitation of children is properly denounced. Thus, violations of 18 U.S.C. § 2256(2)(E) carry with them enormous social stigma and censure. Congress drafted the statute narrowly for this reason. Prior to the rulings of the Third Circuit, *amici's* members, in their attempts to comply with that statute, could obtain guidance from the universal requirement of nudity in determining whether a "lascivious exhibition of the genitals or pubic area" had occurred. Interpreting 18 U.S.C. § 2256(2)(E) to include fully clothed depictions of the genitals or pubic area as lascivious

exhibitions, however, removes that clear standard. This raises the specter that *amici's* members could unwittingly suffer the punishment and censure associated with violation of the statute. Under the sweeping and novel construction of the court below, even if the material does not include nudity or sexual conduct, a publisher, distributor or retailer must speculate whether such depictions could possibly appeal to the lascivious interest of a pedophile -- an inherently impossible determination and a constitutionally unacceptable burden.

On June 7, 1993, this Court granted a writ of certiorari from the first decision of the Third Circuit in this case (*Knox v. U.S.*, 977 F.2d 815 (3d Cir. 1992) ("*Knox I*")) to decide whether there can be an exhibition of the genitals or pubic area under 18 U.S.C. § 2256(2)(E) where the genitals and pubic area are fully covered by an article of clothing. 113 S.Ct. 2926 (1993). After grant of the writ, the United States Government changed its prior position on this question, which altered position adopted part of petitioner's argument. This Court then remanded the case to the Third Circuit for reconsideration in light of the position taken by the Solicitor General. 114 S.Ct. 375 (1993). After such reconsideration, the Third Circuit rejected the reading of the statute proposed by the United States and reaffirmed its prior interpretation set forth in *Knox I*. PA 1 ("Knox II"). The same reasons which caused this Court to grant certiorari in 1993 are still present. The Third Circuit merely tidied up some of the language in its opinion, while reaching the same result. The error of and danger from the Third Circuit's expansive interpretation remains. The Court should grant certiorari again and correct this significant error.

SUMMARY OF ARGUMENT

The issue before the Court is one of statutory construction: whether photographic images of clothed minors engaged in no sexual activity can be the basis of criminal convictions under 18 U.S.C. § 2252(a)(2) and (4). Traditional principles of statutory construction, the legislative history of the statute and judicial

precedent confirm that clothed images do not constitute a "lascivious exhibition of the genitals or pubic area."

In both of its decisions, the Third Circuit held that petitioner Stephen A. Knox violated 18 U.S.C. § 2252(a)(2) and (4) by possessing three videotapes purportedly depicting lascivious exhibitions of the genitals or pubic area of minors, although it is undisputed that none of the tapes contained nudity. The Third Circuit conceded in *Knox I* that its holding applied an expansive definition of the statutory requirement of a "lascivious exhibition of the genitals or the pubic area." Under that holding, reaffirmed in *Knox II*, such an "exhibition of the genitals or pubic area" occurs even when the genitals or pubic area are fully clothed and those body parts cannot be seen.

The Third Circuit's decision is based on an erroneous interpretation of the statute and its legislative history. Non-nude depictions are not "exhibitions" of the genitals or pubic area. Therefore, they simply are not "sexually explicit conduct" within the meaning of the statute. Even the United States concedes that nudity, or at a minimum, a visible depiction of the genitals or pubic area, must be present to have an "exhibition" under 18 U.S.C. § 2256(2)(E). *See* Brief for the United States on Remand to the Third Circuit 11 ("USBr Rem").

In *Knox II*, the Third Circuit analyzes "lascivious exhibition," emphasizing the subjective aspect of lasciviousness, while failing to acknowledge the objective statutory requirement of an exhibition of "the genitals or pubic area" -- which requires nudity. The Third Circuit's holding criminalizes any material depicting a minor which appeals to the lascivious interest of the intended audience. However, the statute does not -- and constitutionally cannot -- criminalize expression containing only lawful images of minors because the expression encourages sexual thoughts. Thus, the only images of minors that are prohibited by the statute are those involving actual sexual conduct (not at issue here) or "lascivious exhibition of the genitals or pubic area" -- which, at a minimum,

requires a nude depiction, and which is absent from the material at issue here.

Relying on a misunderstanding of the legislative history, the Third Circuit erroneously held that the statute does not require nudity and that therefore fully-clothed genitals or pubic areas can be deemed lascivious. The criminalization of fully-clothed depictions also ignores the leading case on this subject, *New York v. Ferber*, 458 U.S. 747 (1982). Even if Congress had meant to include photographs of clothed children not involved in sexual conduct within the definition of child pornography, such a definition would be beyond the scope of material permitted by *Ferber* to be regulated or banned.

Permitting punishment for non-nude depictions raises serious practical and constitutional concerns and the risk of ruinous prosecutions for the mainstream *amici*. Eliminating nudity as a requirement for a finding of a "lascivious exhibition of the genitals or pubic area" would expand significantly the range of materials -- books of art photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, catalogues and even family pictures -- it would be criminal to produce, sell or possess since they could be deemed "lascivious." The subjective standard adopted by the Third Circuit would severely chill mainstream businesspersons engaged in the creation, distribution and sale of visual images; they would have to apply an imprecise, subjective test to every item they produced or sold involving depictions of clothed minors.

ARGUMENT

I. BOTH THE STATUTORY LANGUAGE AND CONGRESS' INTENT REQUIRE NUDITY. ACCORDINGLY A DEPICTION OF FULLY COVERED GENITALS AND PUBIC AREA CANNOT CONSTITUTE A LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA UNDER 18 U.S.C. § 2256(2)(E).

A. The Plain Language of the Statute Excludes Liability for a "Lascivious Exhibition" When Clothing Conceals the Body Parts Named in the Statute.

Congress' unequivocal intent in enacting 18 U.S.C. § 2256(2)(E) was to prohibit only exhibitions that both (1) depicted genital or pubic nudity and (2) were lascivious. A review of the statutory language and the statute's legislative history reveals that Congress did not intend to criminalize depictions in which the genitals or pubic area are completely clothed and thereby concealed from view.

The language of the statute and its "ordinary" meaning is the first line of inquiry in determining a statute's scope. *Moskal v. United States*, 498 U.S. 103, 108 (1990). Here, the statutory language itself evinces Congress' requirement that, to be considered child pornography, a lascivious exhibition must involve, at a minimum, a nude depiction of the genitals or pubic area.

The Third Circuit misdirected its inquiry when it searched for the meaning of "lascivious exhibition." *Knox II* at PA 24; *Knox I* at 820. There is no real question what "exhibition" means: as the Third Circuit acknowledged, it means "display" or "show." (PA 25-26). "Exhibition," "display" and "showing" all require "present[ation] to *view*," "presentation . . . in open *view*," "caus[ing] or permit[ting] to be *seen*." *Webster's Ninth New Collegiate Dictionary* (1984) (definitions of "exhibition," "display" and

"show") (emphasis added); *see Webster's II, New Riverside University Dictionary* 452 (1984) [hereinafter *Webster's II*] (defining "exhibit" as "[t]o show externally, . . . [t]o present for public view"). It would be a strange art "exhibition" if all the pictures were hidden by cloth covers. There can be no question in this case, as in all cases involving a visual image, that *something* was "exhibited" --*i.e.*, made visible -- in the videotapes. However, the dispositive inquiry is whether what was exhibited was the "genitals or pubic area,"[1] as the statute requires, and whether such an exhibition was "lascivious."

The Third Circuit properly rejected the district court's "novel" interpretation of the term "pubic area," properly referred to the rule of lenity, and properly indicated that the term should be confined to its "medically accepted meaning."[2] *Id.* To the contrary, as the court below acknowledged, "the genitalia and pubic areas of the young girls [in the videotapes] were always *concealed* by an abbreviated article of clothing." *Knox I* at 817 (emphasis added). It was the *clothing* covering the genitals and pubic area that was "show[n] externally," *Webster's II* at 452, and thus only the *clothing* was "exhibited." That which is "always concealed" is, by definition, *not* "displayed."

In addition, the Third Circuit's broad interpretation makes no sense within the context of the statute as a whole. The statute lists "lascivious exhibition of the genitals or pubic area" as one of five examples of proscribed "sexually *explicit* conduct," along with

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[1] The legal definition" of "genitals" and "pubic area" presumptively should be consistent with their "standard medical definition[s]." *Knox I* at 819. It hardly requires a dictionary to know that "genitals" are "the various external and internal organs concerned with reproduction." *Dorland's Illustrated Medical Dictionary* 686 (27th ed. 1988). Plainly, in medical terminology, neither the "genitals" nor the "pubic area" encompass the clothing that covers them.

[2] Indeed, the trial court below understood that the object on "exhibition" must be revealed -- and not concealed by clothing -- when it strained to include the "uppermost portion of the inner thigh" as part of the "pubic area," which is required by the statute to be lasciviously exhibited, in order to rationalize upholding Mr. Knox' indictment. *Knox I* at 818.

actual or simulated sexual intercourse, bestiality, masturbation and sadistic or masochistic abuse. 18 U.S.C. § 2256(2)(A)-(E) (emphasis added). The "lascivious exhibition" category can only be interpreted properly in the context in which it was drafted: as one type of sexually "explicit" conduct. *See* 2A Norman Singer, *Sutherland on Statutory Construction* §§ 47.16, 47.17 (5th ed. 1992). Non-nude depictions alone are not "sexually explicit conduct" and fall outside the rubric of sexually-explicit materials prohibited by the statute.

B. The Statute's Legislative History Confirms that Nudity is a Minimum Requirement for a "Lascivious Exhibition of the Genitals or Pubic Area."

Congress' intent to criminalize depictions containing, at a minimum, nudity and lascivious behavior is confirmed by the statute's legislative history. See *United States v. R.L.C.*, 112 S. Ct. 1329, 1334 (1992); *Moskal v. United States*, 498 U.S. 103, 110 (1990). In enacting the statute, Congress specifically addressed and rejected as overbroad standards virtually identical to the one adopted by the Third Circuit. Indeed, not only did Congress make clear that nudity is a requirement, it also made clear that nudity alone is insufficient.[3] Something more, namely a "lascivious exhibition of the genitals and pubic area," is required.

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[3] The recent "Confirmation of Intent of Congress" is inadmissible as legislative history and is irrelevant. On November 4, 1993, the Senate unanimously adopted, as an amendment to an unrelated bill, a "confirmation of intent of Congress," stating it is Congress' intent that § 2256(2)(E) "is not limited to nude exhibitions or exhibitions in which the outlines of those areas were discernible through clothing." 139 Cong. Rec. S14976 (Daily ed., Nov. 4, 1993). This amendment, as well as the positions expressed by the *amici* members of Congress before the Third Circuit, amount to nothing more than attempts retroactively to create legislative history contrary to the actual contemporaneous legislative history. "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage.

(Continued on next page)

The legislative history of 18 U.S.C. § 2256(2)(E) demonstrates that Congress did not intend to include non-nude depictions within the scope of the statute. S. 1011 (the "Roth bill"), the original legislative proposal that led to enactment of 18 U.S.C. §§ 2251-2257 in 1977, prohibited "[n]udity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. Rep. No. 95-438, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 60 [hereinafter S. Rep. No. 95-438]. Congress specifically rejected that nudity standard because it was overly broad. The Senate report recommending passage of the revised bill, which deleted the nudity standard, warned that the deleted nudity standard was "so broad that it could conceivably prohibit such innocent scenes as 'skinny dipping' or even nude snapshots of babies that were mailed to grandparents." *Id.* at 49. Congressman Edward I. Koch said he would not endorse the nudity standard because he was "*concerned*

(Contined from preceding page)

[citation omitted]. Such statements represent only the personal views of these legislators, since the statements were [made] after passage of the Act." *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 132 (1974) (citation omitted).

> Subsequent legislative history — which presumably means the *post*-enactment history of a statute's consideration and enactment— is a contradiction in terms. The phrase is used to smuggle into judicial consideration legislators' expressions *not* of what a bill currently under consideration means (which, the theory goes, reflects what their colleagues understood they were voting for), but of what a law *previously enacted* means.... Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote.

Sullivan v. Finkelstein, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring) (emphasis added).

Post-enactment statements are even less trustworthy guides to legislative intent when they are made, as here, seventeen years after the enactment in question, and by legislators the majority of whom had no role in the original enactment. The definitional language reflecting the nudity requirement was enacted in 1977 and has not been changed since. More than half of the Senators who signed the "confirmation of intent of Congress" were not Members of the Congress when the bill was adopted in 1977.

about the breadth of [that] term[]." 123 Cong. Rec. 17227 (June 1, 1977) (emphasis added). The Committee on the Judiciary, reporting on the bill, recommended that Congress reject the original bill based in part on the Justice Department's conclusion that "there was a very strong possibility that the courts would declare this section unconstitutional on its face." S. Rep. No. 95-438 at 49.

The Congressional debate focused on which subset of nude depictions fell within the statute's reach. For example, then Assistant Attorney General Patricia M. Wald, in a letter to the Chair of the Judiciary Committee, proposed that the language, subsequently adopted, requiring "lewd [now, lascivious] exhibitions of the genitals" be substituted for "nudity." S. Rep. No. 95-438 at 63 (letter from Assistant Attorney General Wald to Senator James O. Eastland). The new language was intended to "make clear in the legislative history of the bill what types of *nude* portrayals of children were intended to be encompassed within the statutory definition." *Id.* (emphasis added). *The extensive debates throughout the statute's history do not include a single reference to criminalizing non-nude depictions.*[4] The statute cannot properly be read to criminalize non-nude depictions when Congress never considered such an application.

Even the prosecutors who testified before Congress as it considered amendments to the statute understood 18 U.S.C. § 2256(2)(E) to require nudity *plus* lewdness or lasciviousness. Robert Pitler, Bureau Chief of New York's District Attorney's Appeals Bureau, testified that "lewd exhibition of the genitals . . . means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display." *Hearings on S. 2856 Before*

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[4] *See, e.g., Protection of Children Against Sexual Exploitation Act of 1977*, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40; *A Bill to Amend the Sexual Exploitation of Children Act of 1977: Hearings on S. 2856 Before the Subcomm. on Juvenile Justice of the Comm. of the Judiciary*, 97th Cong., 2d Sess. 111 (1982); *Child Protection Act of 1984*, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492; *Child Sexual Abuse and Pornography Act of 1986*, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952.

the Subcomm. on Juvenile Justice of the Comm. on the Judiciary, 97th Cong., 2d Sess. 111 (1982) (statement of Robert Pitler). He reiterated this point several times during his testimony, emphasizing that excluding "mere nudity" from the statute helped insure its constitutional application. *Id.* at 115-16.

Thus, while Congress expressly rejected the overly-broad nudity requirement in favor of a narrower standard, at no time did it "repudiate[] its earlier intention to confine the statute's coverage to nude exhibitions" as the Third Circuit found. *Knox II* at PA 36. That mistaken interpretation results in the broad prohibition that Congress rejected, and endangers creators, publishers, distributors and possessors of valuable mainstream works of art and literature that are in no way sexually exploitative. The United States has confirmed this interpretation of the legislative history by concluding, along with the *amici*, that at a minimum, nudity or visible depictions of the genitals or pubic area must be present to qualify as an "exhibition" under 18 U.S.C. § 2256(2)(E). (USBr 10).

C. Congress' Intent is Presumptively Consistent With the Child Pornography Laws of the Fifty States.

The Third Circuit's unconventional construction of 18 U.S.C. § 2256(2)(E) would criminalize depictions that *no* state has criminalized. It appears that no state criminalizes an "exhibition" when the genitals or pubic area is fully covered by clothing. There are state statutes which, like the federal law, prohibit lewd or lascivious exhibitions of the genitals but, in no reported case has this language ever been interpreted to criminalize an "exhibition" in which clothing conceals the genitals or pubic area. Although to *amici*'s knowledge no court has ever expressly decided the question[5] — presumably because no state prosecutor has urged the extreme

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[5] Contrary to the argument in the court below of *amici* National Law Center for Children and Families, *People v. Walcher*, 162 Ill. Ct. App. 3d 455, 515 N.E. 2d 319 (4th Dist. 1987), involved numerous depictions in which the genitals were visible or exposed. *Id.* at 461, 515 N.E. 2d at 323.

construction adopted by the Third Circuit — courts in two such states have suggested that actual exposure of the body parts is an essential element of their exhibition.[6]

The federal government's interest in protecting children from sexual exploitation is no stronger — or different in any pertinent respect — from that of the states. The fact that no state has criminalized the type of depictions at issue here is strong support for the Court to conclude that Congress also did not consider the genitals or pubic area to be exhibited when concealed from view. Accordingly, the judicial branch should not construe the statute in a way that would be inconsistent with the plain and dictionary meanings of the statutory terms, and inconsistent with the common understanding of those terms as reflected in state laws throughout the country.

II. WERE THIS COURT TO AFFIRM THE THIRD CIRCUIT'S "EXPANSIVE" READING, IT WOULD CREATE PROBLEMS OF CONSTITUTIONAL DIMENSIONS.

A. Criminalizing Non-nude Depictions Unconstitutionally Expands the Definition of Child Pornography Beyond That Authorized by *Ferber*.

This Court has permitted criminalization of non-obscene depictions of children only within narrow, judicially-established parameters. *See New York v. Ferber*, 458 U.S. 747, 764-767 (1982). To pass constitutional muster, legislation proscribing non-obscene sexually explicit depictions of children must (1) expressly define the conduct to be prohibited by applicable law as written or authoritatively construed, (2) "be limited to works that *visually* depict 'sexual conduct' by children below a specified age," (3)

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[6] *See People v. Wallace*, 11 Cal. App. 4th 568, 14 Cal. Rptr. 2d 67, 75 (5th Dist. 1992); *State v. Petrone*, 468 N.W.2d 676, 687 (Wis. 1991), *cert. denied*, 112 S. Ct. 339 (1991).

suitably limit and describe the sexual conduct proscribed and (4) impose an "element of scienter on the part of the defendant."[7] *Id.* at 764-65 (emphasis added). Accordingly, "depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain[] First Amen[illegible]t protection." *Id.* at 765.

Specific and objective standards are required so that businesspersons, such as *amici*'s members and *amici*, can objectively determine whether visual images that they produce, distribute, receive or possess could be deemed unlawful under the statute. By contrast, the standard adopted by the Third Circuit requires a subjective exploration of someone's intent and the subjective effect on the observer. *Knox II* at PA 40. That inquiry patently falls short of *Ferber's* requirements of specificity and objective inquiry, and imposes a constitutionally unacceptable burden on *amici* and their members.

The Third Circuit's previous analysis violates *Ferber's* restrictions in two distinct ways. First, by eliminating the requirement of nudity, the court blurred the definition of statutorily-defined conduct and expanded the category beyond depictions of "sexually explicit conduct" as set forth in the statute. To criminalize the depictions at issue in this case would effectively nullify the *Ferber* requirement that categories of sexual conduct "be suitably limited and described." 458 U.S. at 764-65.

Second, by focusing on lasciviousness as the "limiting principle" in the phrase "lascivious exhibition of the genitals or pubic area," the court below transformed "lasciviousness" to a "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer." *Knox I* at 823; *Knox II* at PA 40. If lasciviousness can only be determined by an inquiry into the intent behind and the projected reaction to a particular work,

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[7] The United States Supreme Court also requires that laws regulating obscenity specifically define and describe the sexual conduct that is prohibited. *Miller v. California*, 413 U.S. 15, 24 (1973).

there is no objective structure available to a person reviewing depictions of minors to determine whether those depictions could be deemed to violate the statute. This subjective standard, when coupled with the deletion of the nudity component, leaves producers and distributors of visual materials involving minors bereft of any objective guidelines to protect themselves, and imposes on mainstream businesses the virtually insurmountable burden of scrutinizing the communicative intent and potential impact on unknown viewers of innumerable items in their inventory.

As long as there is an objective requirement -- *i.e.*, the requirement that nude exhibition of the genitals or pubic area be present -- the inherent ambiguity and subjectivity of the concept of "lasciviousness," although still troublesome, at least does not leave producers, distributors and authors totally at sea in predicting what might be punishable. The adoption of a totally subjective test would have a serious impact on the publishing, producing and library communities. Publishers, producers, retailers and librarians, faced with the prospect of child pornography prosecutions limited only by a subjective test of lasciviousness, would have only one rational response: self-censorship.

The test adopted by the court below permits criminal punishment based on a work's potential impact on a particular, and perhaps a particularly susceptible, viewer.[8] If the requirement of nudity is removed and is replaced with an inquiry into subjective intent and impact, a wide range of materials — books of fine photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, clothing catalogs and even family pictures — could fall within the class of child sexual exploitation and thus be criminal. The producers and distributors of those works would be unable to predict when they are in compliance with

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[8] This is a step backward to the now discredited rule of *Regina v. Hicklin*, L.R., 3 Q.B. 360 (1868). *See Roth v. United States*, 354 U.S. 476, 488-89 (1957); *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182, 184-85 (S.D.N.Y. 1933), *aff'd sub. nom United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

the law. No justification compels the Court to make that radical departure from established standards.

The apparent concern of the court below that the videos in question were intended to arouse pedophiles is understandable, but cannot justify a radical rewriting of the child pornography law. However reprehensible society may consider individuals who are aroused by images of minors, the law cannot, consistent with the First Amendment, outlaw all images that a pedophile might find arousing. Stretching laws designed to prohibit sexual abuse through pornography to encompass any image that might be considered lascivious by a pedophile would unconstitutionally chill a broad range of valuable protected speech without any likely impact on actual child abuse.

B. As Defined by the Third Circuit, 18 U.S.C. § 2256 is Vague, Overbroad and Could Criminalize Legitimate Materials.

The erroneous interpretation of 18 U.S.C. § 2256 by the court below raises overbreadth and vagueness problems of constitutional dimensions. By contrast, the narrower interpretation advanced here, rooted in established principles of statutory construction, the legislative history, and prior judicial holdings, would avoid such constitutional concerns.

1. The Third Circuit's Decision Creates the Risk of Real and Substantial Overbreadth.

"The specific rationale of overbreadth scrutiny rests on a recognition that the actual application of overbroad laws is not their only vice. Rather, the doctrine emphasizes the need to eliminate an overbroad law's deterrent impact — or chilling effect — on protected primary activity (*i.e.*, freedom of expression)." Note, *The Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 853 (1970). *See also Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

This Court has recognized that a broad reading of the "lascivious exhibition" language could render the statute constitutionally overbroad. In *Ferber*, the Court suggested that "an expansive construction to the proscription on 'lewd exhibition[s] of the genitals,'" statutory language nearly identical to that at issue here, could "widen the possibly invalid reach of the statute." 458 U.S. at 773. By broadly construing "lascivious exhibitions" to encompass clothed depictions lacking any sexual conduct, the court below has done precisely what this Court warned against in *Ferber*.

That expansive interpretation opens the door to unconstitutional prosecutions. *See Osborne v. Ohio*, 495 U.S. 103, 112-16 (1990). This construction implicates federal prosecution of countless examples of visual materials that creators, producers, distributors and purchasers would never expect to be criminally proscribed, which Congress did not intend to criminalize, and the regulation of which is constitutionally impermissible. Home videos, music videos (which often feature close-ups of portions of the bodies of gyrating dancers), art photographs, television (including teenage dance shows and cheerleading contests, which again often feature close-ups), exercise videos (which oftentimes could be considered to focus on the clothed genital or pubic areas of the athletes), advertisements and films, including home videos, would be suspect.[9] Even advertisements for athletic wear or suntan lotion, which include youngsters, could be criminalized under the Third Circuit's construction. Artists could no longer safely use clothed minors as models, as many of the world's renowned artists have done. *See Massachusetts v. Oakes*, 491 U.S. 576, 593 (1989) (Brennan, J., dissenting).

Under the lower court's interpretation, any of those works could be deemed criminal to possess or sell, even though they included neither sexual conduct nor nudity. The breadth and scope

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[9] The notion that home videos could be subject to prosecution is hardly far-fetched. Mr. Knox's prosecution was based in part on a videotape compiled by Mr. Knox from purchased videos. *See Knox I*, at 817.

of the Third Circuit's expansive interpretation undoubtedly will have an unconstitutional chilling effect on *amici* and their members, and the statute should be construed to avoid such substantial overbreadth.

2. The Court's Erroneous Interpretation is Impermissibly Vague.

The vagueness inherent in the interpretation of the court below poses insurmountable problems for media *amici*'s members and other creators, producers and distributors of mainstream visual materials. When First Amendment rights are at issue, this Court has refused to tolerate the type of vagueness and overbreadth problems presented by the interpretation of the Third Circuit:

> The objectionable quality of vagueness and overbreadth . . . [depends] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-33 (1963) (citation omitted). By requiring a subjective inquiry into whether materials possibly could be deemed to appeal to the lascivious interest of the intended audience as the sole limiting principle of the statute's scope, *Knox* II at PA 40, the court below has invoked a standard that eludes definitive interpretation and that necessarily will be subject to disparate, variable and selective interpretation. Such ambiguity must be, and can be, avoided by the straightforward application of rules of statutory construction which yield the generally

acknowledged requirement of nudity, plus something more — lasciviousness.

The lower court's reading of the statute is vague, impossible to apply, and fails to draw the line between the allowable and forbidden with any precision. A standard adopting a subjective inquiry leaves wholesalers, distributors, bookstores, libraries and video stores with the impossible burden of guessing the projected effect on a recipient. The difficulty of complying would be compounded by the looming specter of a criminal child pornography indictment and conviction. The Court need not and should not adopt a broad construction that raises grave constitutional concerns when an alternative construction is available, particularly when, as here, that narrower construction is supported by the statutory language, the statute's legislative history and prior judicial holdings.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to grant certiorari in this case.

November 7, 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STEPHEN A. KNOX, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL PARENT TEACHER ASSOCIATION, NATIONAL COALITION AGAINST PORNOGRAPHY, "ENOUGH IS ENOUGH!", CHILDHELP USA, CHILD WELFARE LEAGUE OF AMERICA, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, NATIONAL COUNCIL OF CATHOLIC WOMEN, JUSTICE FOR CHILDREN, THE LUTHERAN CHURCH -MISSOURI SYNOD, RABBINICAL ALLIANCE OF AMERICA, WOMEN AGAINST PORNOGRAPHY, FOCUS ON THE FAMILY, FAMILY VIOLENCE & SEXUAL ASSAULT INSTITUTE, FAMILY RESEARCH COUNCIL, INC., CHRISTIAN LIFE COMMISSION-SOUTHERN BAPTIST CONVENTION, CHRISTIAN ACTION NETWORK, "HURT", COALITIONS FOR AMERICA, FREE CONGRESS RESEARCH & EDUCATION FOUND., SAVE AMERICA'S YOUTH, CITIZENS AGAINST PORNOGRAPHY, TRADITIONAL VALUES COALITION, CHRISTIAN LEGAL DEFENSE AND EDUCATION FOUNDATION, VOICES FOR VICTIMS, CHILD PROTECTION LOBBY, NAT'L ALLIANCE FOR FAMILY COURT JUSTICE, ENDING MEN'S VIOLENCE NETWORK, EAGLE FORUM, CHRISTIAN COALITION, NAT'L CENTER FOR REDRESS OF INCEST & SEXUAL ABUSE, AMERICAN COALITION FOR ABUSE AWARENESS, VOICES IN ACTION, INC. AS *AMICI CURIAE* OPPOSING CERTIORARI.

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INTEREST OF THE AMICI CURIAE*

Amici comprise a broad, non-partisan collection of public interest groups whose membership include the survivors of childhood sexual abuse and professionals who expend considerable energy advocating legal and social reforms to protect children. The National Law Center for Children and Families acted as counsel for *Amici* when this case was previously before the Court and on remand to the United States Court of Appeals for the Third Circuit. All *Amici* agree the decision of the Court below provides a much-needed measure of protection to children. For the Court's convenience, Appendix B contains a full description of all *Amici*.

COUNTERSTATEMENT OF QUESTION PRESENTED

Must there be nudity or genital visibility in order for a child's genitalia to be exhibited lasciviously in contravention of 18 U.S.C. Section 2256(2)(E) where Section 2256(2)(E) does not contain a nudity or visibility requirement on its face and where Congress in fact deleted a nudity requirement?

SUMMARY OF THE ARGUMENT

Section 2256(2)(E), on its face, broadly prohibits all lascivious exhibitions of children's genitalia. This case thus presents a straightforward question of statutory interpretation. Because Section 2256(2)(E) is clearly and unambiguously worded there is no need to resort to legislative history. *National Org. for Women v. Scheidler*, 114 S. Ct. 798, 806 (1994).

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* This brief is submitted with the written consent of both parties, filed with the clerk of this Court.

The videotapes at issue violate Section 2256(2)(E) because they depict scantily-clad minor females in unnatural, sexual postures and extended close-up vignettes of their genitalia. Moreover, the advertising literature accompanying these videotapes describes the children depicted as alluring and sexually inviting. In fact, Petitioner does not seriously dispute the lascivious character of the Nather Tapes.

Instead, Petitioner advocates an unjustifiably narrow interpretation of the word "exhibition." According to Petitioner, if a close-up vignette lingeringly displays a child's clothed genitalia, only the clothing is exhibited.

The Third Circuit correctly rejected this interpretation because it does not comport with common sense, the plain meaning of Section 2256(2)(E), or Congress' manifest purpose in enacting laws against the receipt of child pornography. Contrary to Petitioner's assertion, under the ordinary meaning of "exhibition," in the previously mentioned vignette, both the clothing *and* the genitalia are exhibited.

Finally, there are strong policy reasons for refusing to review the Third Circuit's opinion. If Section 2256(2)(E) is interpreted any differently, a new genre of child pornography will become commercially viable. A newly legitimate market for "backdoor child porn" would necessarily victimize vulnerable children. This would clearly fly in the face of Section 2256(2)(E).

ARGUMENT

I. THE NATHER TAPES CONTAIN "EXHIBITIONS" OF THE GENITALIA OF CHILDREN.

A. The Plain Meaning of "Exhibit" Does Not Presuppose Nudity or Genital Visibility.

The term "exhibition" is not statutorily defined. The Third Circuit appropriately gave the term its common and ordinary meaning. Pet. for Cert. at PA 25-26; *see Smith v. United States*, 113 S. Ct. 2050, 2054 (1993). Webster's Dictionary defines "exhibit" as "to present or expose to view; show; display... put on display in order to attract notice." Webster's New World Dictionary at 476 (3d ed. 1991).

Petitioner's reading of the history of the phrase "lascivious exhibition" misapprehends and misconstrues Congressional intent. As this Court has long held, it is appropriate to conclude that the ordinary meaning of the term "exhibit" reflects Congressional intent. *See Richards v. United States*, 369 U.S. 1, 9 (1962); *see also American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). To support his strained interpretation of Section 2256(2)(E), Petitioner cites witness statements and a Department of Justice letter addressing a prior version of the bill which would become Section 2256(E)(2) to conclude nudity is a prerequisite to criminal liability under Section 2256(2)(E). Only one of these statements, however, is attributable to a Member of Congress and that statement was made in 1986, well after the 1977 legislation had been enacted. A passing reference to a law that has been on the books for ten years does not, indeed cannot, amount to a statement of Congressional intent. *See Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102 (1974).

A letter from Assistant Attorney General Wald (upon which Petitioner heavily relies) criticized and recommended changes to a previous and discarded version of Section 2256(2)(E). That the discarded version would have employed the limiting term "nudity" supports *Amici's* conclusion that Congress did *not* intend to confine the statute's coverage to nude exhibitions. According to well established canons of statutory construction, when Congress rejects one proposed statutory formulation in favor of another one, it is presumed that Congress has intentionally rejected the discarded formulation. *See Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Thus when Congress rejected language which would have limited "lascivious exhibition" to exhibitions of nudity in favor of legislation which criminalized *every* "lascivious exhibition," Congress deliberately rejected a nudity requirement. Not only is Petitioner attempting to read a nudity requirement into a statute which has none, he is attempting to re-insert a nudity requirement that Congress intentionally deleted. The Third Circuit correctly refused Petitioner's invitation to "re-write" Section 2256(2)(E).

In short, Petitioner's analysis of the legislative history of Section 2256(2)(E) only demonstrates that Congress chose not to classify mere depictions of child nudity as child pornography. But that is beside the point because the application of Section 2256(2)(E) to nudity without more is not at issue here. In fact, the legislative history neither states nor suggests that nudity is a *sine qua non* for a lascivious exhibition.

B. The Nather Tapes Exhibit Children's Genitalia in Order to Attract Attention.

As the Third Circuit held, the Nather Tapes unquestionably exhibit the genitalia of minor females. Pet. for Cert. at PA 30. While this section discusses only a portion of the tapes, it is representative of their contents as a whole. The following review clearly reinforces the Third Circuit's conclusion that the Nather Tapes include lascivious exhibitions of children's genitalia.

Nather Tape Two ("Nath. 2") opens with images of an adolescent female striking suggestive poses and responding to off-camera directions. Nath. 2 at 1:00-1:48 (Government's Exhibit 6; R.59, 60). While the female is posing, the cameraman focuses in upon her pubic area a number of times. *Id*. Later in Nath. 2, the cameraman centers in on the panties of another early adolescent female. *Id*. at 4:40 & 6:14 & 6:54.

At one point in Nath. 2, an adolescent female says to someone off-camera, "I don't know what to do." Nath. 2 at 8:50. An off-camera voice asks her to push her knees up. *Id*. The female complies and the camera focuses directly on her panties. *Id*. Another off-camera voice then exclaims, "We love it." *Id*.

Also in Nath. 2, a pre-teen female is videotaped in a tree holding a squirming younger female. Nath. 2 at 26:46. The cameraman focuses on the panties of the older child numerous times. The younger child remarks, "My friend did a video and she got five dollars." *Id*. at 29:35.

Later in Nath. 2, a bikini-clad female hangs upside down and her bikini top falls down exposing her nipple. Nath. 2 at 33:34. The cameraman quickly focuses in on the exposed

nipple. *Id.* The cameraman also shoots close-ups of the female's pubic area numerous times. *Id.*

Nather Tape Three ("Nath. 3") opens with an extended close-up shot of a female's genital area. Nath. 3 at 1:00-3:00 (Government's Exhibit 7; R.59, 60). Later in Nath. 3, a female is instructed by an off-camera voice to "pull your pantyhose down." Nath. 3 at 38:00. The female complies and the cameraman focuses on her garter as well as her pubic area. *Id.*

It is absolutely clear from this review of Nath. 2 and Nath. 3 that the genitalia of the children depicted therein are "put on display in order to attract notice." *Accord United States v. Wolf*, 870 F.2d 241, 243-44 (10th Cir. 1989) (ruling that child's genitalia lasciviously exhibited despite the fact that child was sleeping in photograph). The Third Circuit's conclusion that the Nather Tapes "exhibit" the genitalia of minors within the meaning of Section 2256(2)(E) is sound. *Cf. People v. Walcher*, 515 N.E.2d 319, 323 (Ill. 1987)(upholding a state child pornography conviction where the genitals of minor female were "exhibited or displayed ... *albeit* in a somewhat obscured manner")(emphasis in original).

II. THE CHILDREN'S GENITALIA IN THE NATHER TAPES ARE EXHIBITED LASCIVIOUSLY.

A. Lasciviousness Under Section 2256(2)(E) Must Be Determined From the Perspective of Child Pornography Consumers.

As the Third Circuit twice recognized, determining what exhibitions are "lascivious" necessitates an inquiry into the intended effect of a given exhibition. Pet. for Cert. at PA 29-30; *United States v. Knox*, 977 F.2d 815, 823 (3d Cir. 1992)

("Whether a depiction is lascivious is essentially a *subjective inquiry* into whether or not the material is intended to elicit a sexual response from the viewer")(emphasis added). This is entirely consistent with precedent. *See United States v. Villard*, 885 F.2d 117 (3d Cir. 1989); *see also United States v. Dost*, 636 F. Supp. 828, 831 (S.D. Cal. 1986)(articulating six-part test), *aff'd sub nom. United States v. Weigand*, 812 F.2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987); *United States v. Cross*, 928 F.2d 1030 (11th Cir.), *cert. denied*, 112 S.Ct. 594 (1991), *and cert. denied*, 112 S.Ct. 941 (1992). The Ninth Circuit noted in *Weigand* that the term "lascivious" as used in Section 2256 should be defined within a "social, cultural, and moral context." *Weigand*, 812 F.2d at 1244. The *Weigand* Court explicitly observed that lasciviousness for Section 2256 purposes is a characteristic "of the exhibition [or the visual depiction] which the photographer sets up for himself or like-minded pedophiles." *Id*; *see also United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990) (holding that "motive of photographer" is a factor in lasciviousness determination), *cert. denied*, 498 U.S. 1024 (1991).

Moreover, this Court has consistently held that the manner in which sexually explicit material is marketed is relevant to determining whether the material is intended to engender sexual responses. *See Pinkus v. United States*, 436 U.S. 293, 303 (1978). *Pinkus* stands for the common sense proposition that the trier of fact in an obscenity prosecution may consider the subjective intent of the seller and purchaser.

When passing on the question of obscenity *rel non.* that proposition is obviously applicable to child pornography and Section 2256(2)(E). If triers of fact cannot consider such evidence, child pornographers could create visual depictions of children unquestionably calculated to activate pedophilic

desires and yet escape criminal liability. Just as in the case of obscene pornography, triers of fact need not be limited to examining only the "four corners" of videotapes or pictures when attempting to determine whether a particular exhibition is calculated to engender an unhealthy interest in sex with children in child pornography prosecutions.

B. From the Perspective of Pedophiles, the Exhibitions of Children's Genitalia in the Nather Tapes are Lascivious.

In this case, the "Nather Notes," the promotional material seized from Petitioner's residence, strongly supports the conclusion that the Nather Tapes violate Section 2256(2)(E). One advertisement reads: "We do not have any filler material in these videos. . . . Every second is crammed with tender young girls in various revealing outfits." Nather Notes, (February 1990), at Government's Exhibit 4 (R.50, 60). Another promotional release reads, "We have some nice close-ups of the panties she's wearing under those shorts, too," and, "[t]hen, just as you are recovering from all of the above, we bombard you with some nice teen and pre-teen panty close-ups." Nather Notes, (April 1990), at Government's Exhibit 4. Yet another advertisement reads "she is a tease and erotic beyond belief and our famous close-ups are absolutely savage." *Id.* The Nather Company produced a tape entitled *Early Adolescence* and promoted it as an "answer to the many requests we had been receiving for tapes that had almost exclusively candid panty shots." Nather Catalogue, p. 3, at Government's Exhibit 4. In the Nather Catalogue, a tape entitled "*Lollipops*" is touted as containing, "scenes of a thirteen year old in a leopard skin bikini with a magnificent ass that she *puts on display* for you as she walks back and forth slowly and teasingly." Nather Cat., p. 2, at Government's Exhibit 4 (emphasis added).

These quotations are important because they enable the Court to see the Nather Tapes through the eyes of a pedophile. With the Nather Tapes as an aid, it is unambiguously clear that there is more to the videotapes than innocent images of children which coincidentally arouse child pornography consumers. As the Third Circuit correctly held, the "more" is what distinguishes the Nather Tapes as a species of child pornography.

III. UNDER THE TEST SET FORTH IN *UNITED STATES V. DOST*, THE NATHER TAPES VIOLATE THE LETTER AND INTENT OF SECTION 2256(2)(E).

In upholding Petitioner's conviction, the Third Circuit employed the six-factor *Dost* test. *See* 636 F. Supp. at 831; *see also United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989) (formally adopting *Dost* test). This test examines six factors which determine whether a given exhibition is lascivious. Briefly, the six-factor *Dost* test asks:

(1) whether the focal point of the depiction is on the genitalia or pubic area;
(2) whether the visual depictions contain children posed in a sexually suggestive manner or located in a place associated with sexual activity;
(3) whether considering the age of the child, the child is depicted in an unnatural pose or in inappropriate attire;
(4) whether the child is fully clothed, partially clothed, or nude;
(5) whether the depiction suggests coyness or a willingness to engage in sexual activity;
(6) whether the depiction is intended to arouse a sexual response.

Knox, 977 F.2d at 822. No single factor is dispositive. *Id.* at 823.

This Court's decision in *New York v. Ferber*, 458 U.S. 747 (1982), aids in the application of the six *Dost* factors. While articulating the constitutional test for child pornography and distinguishing it from the test for obscenity, this Court held that sexually explicit visual depictions of children need not be "considered as a whole." *Ferber*, 458 U.S. at 764.

Accordingly, a single image intended to engender pedophilic lust is sufficient to establish lasciviousness, notwithstanding a barrage of non-lascivious images contained in the same videocassette. The presence of one depiction in the Nather Tapes which satisfy some or all of the *Dost* factors is therefore sufficient to support a finding of lasciviousness. Similarly, the presence of various images, each satisfying a single *Dost* factor, may be considered together when making a lasciviousness determination.

A. The Nather Tapes Graphically Focus on the Genitalia of the Subjects.

As previously discussed and set forth in Appendix A, Nath. 2 and Nath. 3 continually focus on the genitalia of the subjects. Indeed, the entire purpose of both tapes was to provide pedophiles with sexually arousing images of young girls. *See, e.g.*, Nather Notes, (February 1990) at Government's Exhibit 4. There can be little doubt that the Nather Tapes satisfy the first *Dost* factor.

B. For Pedophiles, the Nather Tapes Display Children in Eroticized Settings.

Because lasciviousness should be examined in the context of pedophile voyeurs, this Court should consider visual images of young girls in playgrounds, schools, and

swimming pools as a child pornography consumer would. *See, e.g.*, Nath. 2 at 33:34 (female in playground). Pedophiles associate these settings with children, whom, to pedophiles, are nothing more than highly eroticized sexual objects. *Cf.* K. Lanning, *Child Molesters: A Behavioral Analysis* 26-27 (3d. ed. 1992) (documenting erotic interest of pedophiles in objects associated with children). It follows as a matter of course that child pornography consumers associate such settings with sex with children.

C. The Children Depicted in the Nather Tapes Are Unnaturally Posed.

At one point in Nath. 2, a young girl states that she does not know how to pose. Nath. 2 at 8:50. She is instructed to position herself so that the camera can focus on her panties. *Id.* This incident reveals that the subject was too young to comprehend what was happening; her poses should therefore be considered unnatural. Obviously, were her poses natural, she would have known how to position herself without instruction.

D. Many of the Children Depicted in the Nather Tapes are Partially Clothed.

Most of the young girls in Nath. 2 and Nath. 3 are depicted in bathing suits or other forms of "abbreviated attire." Pet. for Cert. at PA 25. As discussed above, Congress explicitly chose not to require nudity as a prerequisite to criminal liability under Section 2256. It is also appropriate to consider visual depictions of scantily clad torsos and genitalia, as in the Nath. 2 and Nath. 3, as evidence of an intent to arouse sexual feelings toward children.

E. The Nather Tapes Display Children in a Manner Suggesting Coyness and a Willingness to Engage in Sexual Activities.

At one point in Nath. 2, a child, responding to off-camera directions, pulls a strap down and over her shoulder and gazes at the camera seductively. Nath. 2 at 11:10. The sexual overtones of this image are undeniable. Petitioner cannot credibly contend that this image is in any way non-sexual or innocent.

F. The Nather Tapes Are Intended to Elicit Sexual Responses.

Both Nath. 2 and Nath. 3 contain visual images of scantily-clad girls in suggestive poses. In view of the graphic way in which these videotapes were advertised, it is clear that they were intended to arouse pedophilic sexual desires. Given the tendency of pedophiles to be aroused by non-explicit images of children, the conclusion that the Nather Tapes were intended to appeal to pedophilic interest in sex is unavoidable.

IV. ADOPTING EITHER PARTY'S CONSTRUCTION OF "LASCIVIOUS EXHIBITION" WILL CREATE AND SUPPORT AN OPEN MARKET FOR SEXUALLY SUGGESTIVE DEPICTIONS OF CHILDREN.

A. All Types of Child Pornography, Including the Nather Tapes, Are Directly Linked to Child Sexual Abuse.

The Third Circuit's decision provides a much-needed measure of protection for children. It is indisputable that the sexual abuse of children is often precipitated by child

pornography.[1] *See The Effects of Pornography on Women and Children: Hearings Before the Senate Subcomm. of Juvenile Justice of the Comm. on the Judiciary*, 98th Cong., 2d Sess. 136-139 (1984) (testimony of John Rabun, for the National Center for Missing and Exploited Children) (Committee Serial No. J-98-133); *see also* Ralph W. Bennett, *The Relationship Between Pornography and Extrafamilial Child Sexual Abuse*, The Police Chief, Feb. 1991, at 19; Perm. Subcomm. on Investigations, *Child Pornography and Pedophilia*, S. Rep. No. 537, 99th Cong., 2d Sess. 9 (1986). *See generally* Donnelly, *Protection of Children from Use in Pornography*, 12 J. Law Reform 295 (1979) (comprehensive discussion of the correlation between child pornography and child sexual abuse). Child pornography, thus plays a central role in the sexual abuse of children, justifying pedophilic conduct and assisting pedophiles in seducing children. *See* W. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-offenders*, 25 J. Sex Res. 267-288 (1988). "Backdoor child porn" presents precisely this danger. This Court has recognized the relationship between child pornography and sexual abuse on two separate occasions and concluded on both occasions that child pornography's link to molestation centers upon the government's broad power to prohibit child pornography.

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[1] Scientific studies have demonstrated that repeated exposure to sexually explicit material involving children is directly linked to child sexual abuse. *See, e.g.*, Erickson, *Behavior Patterns of Child Molesters*, 17 Archives Sexual Behav. 77-78 (Feb. 1988) (reporting that large numbers of child molesters use sexually suggestive pictures of children to lower the inhibitions of their victims). And to compound matters, there is a demonstrable link between sexual abuse as a child and criminal behavior as an adult. A. Burgess, *Abused to Abuser: Antecedents of Socially Deviant Behavior*, 144 Am. J. Psychiatry 1431-36 (Nov. 1987); S. Rep. No. 537 at 8 n.27 & 28.

Ferber, 458 U.S. at 759-60; *Osborne v. Ohio*, 495 U.S. 103, 110 (1990); *see generally* S. Rep. No. 537 at 6.

B. Reversing Petitioner's Conviction Will Legitimize the "Backdoor Child Pornography" Market.

In its March and April 1990 "Nather Notes," the Nather Company boasts that its videos "featuring teen and pre-teen girls have proven so popular that not only have they been widely pirated in this country and abroad, *they have also, recently, spurned [sic.] quite a few competitors.*" Nather Notes, (March 1990, April 1990) at Government's Exhibit 4 (emphasis added). It is clear from this advertisement that a large market already exists for "backdoor child porn." In the words of one recognized expert, "[n]o matter how adequate the laws are, how aggressively they may be enforced by police, prosecutors, and the courts...there will always be adults who are anxious to sexually exploit children." Shirley O'Brien, *Child Pornography* 301 (1983) If "backdoor child porn" is de-criminalized and sold openly, the number of consumers will expand.

Petitioner's actions helped to fuel the market for "backdoor child *porn*." He purchased the Nather Tapes, sending a strong message to the Nather Company to continue producing similar videotapes. The Third Circuit's interpretation of "lascivious exhibition" should stand because it will discourage the Nather Company and like-minded entrepreneurs from pandering to the deviant sexual appetites of child pornography consumers.

C. The Expanded "Backdoor Child Pornography" Market Will Require Additional Child Models and Encourage the Producers of "Backdoor Child Pornography" to Aggressively Recruit Them.

If "backdoor child pornography" were de-criminalized, the dynamics of supply and demand would compel producers of such pornography to recruit new "models." Clearly, if the Third Circuit's opinion is overturned and the opportunities for financial rewards are significant, as they no doubt will be, unscrupulous producers will not hesitate to press additional children into service as "pornographic models." In other words, profit-driven and predatory producers will expand their recruitment activities in order to increase their share of the child pornography market.

This proliferation of distributors and producers will create a class of vulnerable children whose livelihood will be dependent on "acting" in child pornography. The children who enter the world of "backdoor child pornography" will become dependent on the money they earn.[2] They will become financially vulnerable to producers who will then have every reason to force them to perform in videos that are increasingly explicit and outrageous. William Stanmeyer, *The Seduction of Society* 86 (1984); *see* Campagna & Poffenberger, *The Sexual Trafficking in Children, supra,* at 161 ("When legitimate opportunities do not exist, survival for children who lack the support of their family may depend

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[2] According to the United States Department of Health and Human Services, about fifty percent of the "runaway population are victims of some sort of commercial sexual exploitation." Daniel Campagna & Donald L. Poffenberger, *The Sexual Trafficking in Children* 147 (1988). It is natural to anticipate that such children will be lured into the Nather work which, at first, will not demand actual sexual intercourse.

upon entry into a commercial sex market"). For this reason alone, the Third Circuit's ruling should not be reviewed.

D. The Increased Availability of "Backdoor Child Pornography" and the Resulting Sexual Exploitation of Child Models Will Dramatically Increase the Number of Sexual Batteries Committed Against Children.

A flourishing market for any genre of child pornography, including "backdoor child pornography," will lead to a dramatic increase in child sexual molestations. Much of the relevant scientific research on sexual arousal strongly suggests that "acts of child sexual molestation by some. . . adults *are precipitated if one achieves orgasm via fantasies of sex with children.*" Stanmeyer, *supra*, at 9 (emphasis added). Nather-like videotapes will be used by consumers to fantasize about sexual liaisons with children, achieve orgasm, and then act out their fantasies.

It is beyond dispute that society has a compelling interest in preventing the sexual abuse of children. *See Ferber*, 458 U.S. at 757. This Court also observed that, "[i]t is also surely reasonable for the State to conclude that it will decrease production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Osborne*, 495 U.S. at 109-10. Similarly, the Court below did nothing more than permit Section 2256(2)(E) to operate so as to decrease demand for "backdoor child pornography."

E. Exposure to "Backdoor Child Pornography" Will Stimulate a Market for More Explicit Types of Child Pornography.

In a *Special Anniversary Notice* for March 1990, the Nather Company advertises, "a 15 year old doll with braces and a 40 inch bust and ass to match in a swimsuit two sizes too small and some nice *pubic peeks*." Nather Notes, (March 1990), at Government's Exhibit 4 (emphasis added). A February, 1990 *Bulletin* from Nather reads, "[o]ne of the girls has a bikini borrowed from an older sister . . . and when she bends over we all get a startling and *rather astonishing look at her full 14 year old bush*." *See* Nather Notes, (February 1990), at Government's Exhibit 4 (emphasis added). These advertisements clearly indicate that "backdoor child *porn*" consumers will not be content for long to view exhibitions of clothing and genitalia. And entrepreneurs will seek to best one another by providing more "peeks" which will last for longer periods of time. As one prominent observer put it, "as long as there is a market for child sex there will be men and women anxious to meet the demand." Clifford L. Linedecker, *Children in Chains* 297 (1981).

Just as child pornography stimulates and precipitates child sexual abuse, exposure to "backdoor child *porn*" will stimulate a desire for more explicit types of child pornography. Producers will undoubtedly attempt to cater to this desire. If , as Petitioner urges, it is permissible to focus on the covered genitalia of children, the next logical step for producers will be to reduce the size and sufficiency of the covering. Thus, as the market for "backdoor child pornography" grows, so too will a commercial market for more explicit forms of child pornography.

F. Society's Interest in Protecting Children from Sexual Victimization Justifies A Prohibition on Depictions of Partially-Clad Children Engaged in Sexual Activity.

This Court has long held that the interests of society should be balanced against asserted first amendment interests. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765-66 (1976). In *Virginia Pharmacy*, for instance, the Court held that so-called commercial speech warrants protection against government intrusion only because of the practical benefits that would accrue to society from extending such protection. *Id.* Importantly, this Court employed a balancing test whereby assertions of first amendment interests are weighed against other societal interests when determining whether to categorize expressive conduct and speech as protected or unprotected. *Id; accord Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

The Third Circuit's decision reflects an a appropriate balance. As noted above it is incontrovertible that society has an interest in protecting the welfare of America's youth. *Ferber*, 458 U.S. at 757 (interest is evident "beyond the need for elaboration"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (interest is "compelling"); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (development of society dependent on "healthy, well-rounded growth of young people"). Furthermore, this Court has held on numerous occasions that society's interest in protecting children outweighs the first amendment rights of adults when, as here, the two are in clear conflict. *See Ferber*, 458 U.S. at 757; *Prince*, 321 U.S. at 164-65; *Ginsberg v. New York*, 390 U.S. 629, 636 (1968); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978) (protection of children justifies proscription on indecent broadcasts notwithstanding the first

amendment rights of adult viewers and listeners); *Arvin*, 900 F.2d at 1388 (state has "broad legislative authority" to protect children from abuse).

Whatever possible first amendment interest child pornography consumers, like Petitioner, might possess in obtaining and viewing young children provocatively posed in undergarments and bathing suits (and *Amici* cannot discover one), any such interest pales in comparison to society's interest in protecting children from just the sort of sexual exploitation child pornography consumers seek to "enjoy."

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

GENERAL OUTLINE OF NATHER TAPES TWO AND THREE

* The numbers listed below reflect the approximate number of minutes and seconds that have elapsed when a given sequence of events has occurred. This is not a complete transcript or listing of the contents of Nather Tapes Two and Three. There are thus other portions of Nather Tapes Two and Three that the Court may consider instructive. Finally, where this outline indicates that voices can be heard, the Court may need to slow the tape and increase the volume.

Tape Two

Timer Count: (minutes: seconds)	**Description:**
1-1:48	Older looking female in suggestive poses; camera focuses on genitalia and pubic area; female is clothed; obviously intended to elicit sexual responses; female responding to off-camera instructions.
4:40, 6:14, 6:54	Obviously early adolescent female; fully clothed; various panty shots, some of which are extended;
8:50	Obviously adolescent female, darker complexion, in short denim skirt; extended panty shots; female says to someone off-camera "I don't know what to do."; off-camera directions were then given followed by another

Timer Count:	Description:
	panty shot; someone off-camera asks to have the knees pushed up closer to the chest after which camera focuses on panties; off-camera voice: "We love it."
11:10	Young female responds to off-camera instructions and pulls strap down over her shoulder and gazes at camera seductively.
14:50, 18:20	Young children receiving directions from off-camera; camera focuses on pubic area; children in sexual poses inappropriate for age.
26:46, 29:35	Two young children - one very young - in tree; children fully clothed; the smallest child squirms and says, "Let me go."; later, smallest child remarks, "My friend did a video and she got five dollars."; panty shots of older child; audio then dies.
33:34	Female in bikini bathing suit (*i.e.*, partially clothed); camera focuses on pubic area; intended to elicit sexual response; girl hangs upside

Timer Count:	Description:
33:34 (cont.)	down; bathing suit top falls and nipple shows - camera focuses on nipple.
39:35, 40:35	Female poses in bathing suit; responding to off-camera directions; numerous close-ups shots of pubic area.
Tape Three	
1:00-3:00	Extended close-up shots of genital area;
38:00	Female in dress; camera attempts to focus on pubic area under dress; voice off-camera instructs female "Pull your panty hose down."; female complies and reveals garter.
55:46	Younger child; camera focuses on child's genital area

APPENDIX B

INTEREST AND DESCRIPTION OF THE AMICI

The **National Law Center for Children and Families** ("National Law Center"), based in the Washington metropolitan area, is a non-profit legal organization dedicated to the protection of children and the preservation of families through the enforcement of existing laws across the nation and the promulgation of new legislation against illegal pornography and sexual exploitation.

Through its legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

National Law Center attorneys assist many county, city and civic leaders around the nation in drafting and enacting new legislation concerning obscenity, child pornography, and materials which is harmful to minors. The National Law Center also disseminates information to legislators, law enforcers, public officials, and concerned citizens on pornography, its effects, and the laws which regulate it.

The National Law Center is dedicated to equipping law enforcement personnel with the background information, pleadings, and legal techniques necessary to win the war for our children and families. Presently, the National Law Center is involved in publishing training materials and reference manuals on child sexual exploitation and obscenity. Its legal staff has conducted legal and law enforcement

training for thousands of investigators and prosecutors since 1984.

The National Law Center has participated in numerous Amici Curiae briefs before the Supreme Court, including *Osborne v. Ohio, Alexander v. United States*, and *Jacobson v. United States*.

The National Parent Teacher Association ("PTA") is a section 501 (c) (3) non-profit association and the nation's largest child advocacy organization, comprising over 6.9 million members in the United States, the District of Columbia and Department of Defense Schools in Europe and the Pacific. Founded in 1897, the National PTA has long been involved in assuring the health and protection of children and youth working on such issues as child labor laws, quality children's television, family preservation and juvenile justice. As expressed in a resolution passed on "Obscene and Pornographic Materials," the National PTA supports "legislation and the strengthening of existing laws to preclude the use of children in the creation, production and manufacture of obscene and pornographic material."

The National Coalition Against Pornography ("N-CAP") was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual violence and child molestation in the United States. Numerous respected studies confirm this opinion.

With members representing over 50 religious groups, denominations, citizen action groups and foundations, N-CAP works to increase public awareness of the harm caused by obscenity, indecency and child pornography and to

implement a number of programs designed to minimize the threat they pose to our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity, indecency and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representative and the U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on a national basis, with specific involvement in dozens of local cities at any given time. The fundamental mission and purpose of N-CAP is in protecting children through the elimination of child pornography and obscenity, and the restriction of indecency.

The **"Enough is Enough!"** campaign's mission is to greatly reduce sexual violence and to prevent children, women, men and families from becoming victims by eliminating child pornography and removing hard-core and illegal pornography from the marketplace.

This is an educational program with a plan to mobilize America's women in the battle against the abusive, predatory material that is flooding our nation. Pornography leaves in its wake broken lives and homes, as its chain of abuse victimizes women and their children.

The "Enough is Enough!" campaign includes women from varied backgrounds, professions, religions, non-profit organizations and political affiliations. This is a campaign with a focused target (that which is illegal), and a diverse, growing constituency. It is a unique effort in that moderate, liberal and conservative women are joining together to deal with hate literature which eroticizes inequality and violence, preys upon children and holds a fatal attraction for many men.

Over 30% of the states' First Ladies and numerous other women of influence have become members of the National Committee of Support, and this list is expanding.

The national launch of the "Enough is Enough!" campaign was held November 1992. Since that date, educational meetings and training seminars have been held in cities from Coast to Coast. This campaign is not creating a new organization, rather, initiating a movement. Local action is on the increase as women are empowered to bring about change. They are encouraged, educated and provided with materials to equip them to succeed in their efforts. Women are investing their influence to change the way America thinks about pornography.

The National Center for Missing and Exploited Children (the "Center") is a non–profit, tax–exempt corporation chartered in the District of Columbia in 1984, with goals of decreasing the incidence of crimes against children, effecting positive changes in public law and policy, encouraging an awareness of the significance of all crimes against children, and assisting families and those who seek to protect children. The Center works in cooperation with the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice in coordinating the efforts of law

enforcement, social service agencies, elected officials, judges, prosecutors, educators, and the public and private sectors on child protection issues.

The Center has been funded by the Office of Juvenile Justice and Delinquency Prevention since 1984 to implement tasks under 42 U.S.C. §§5771–5777, including operation of the national toll–free hotline for reports of missing children; operation of the national resource center and clearinghouse for prevention, investigation, prosecution, and treatment of the missing and exploited child case; and assistance to OJJDP in performing its task of coordinating federally funded programs related to missing children. The Center actively assists federal and state law enforcement agencies' efforts to reduce the incidence of sexual exploitation, including passing reports of child pornography received on the hotline to agents of the U.S. Customs Service, U.S. Postal Inspectors Service and local police departments for investigation. The Center provides information on specific federal and state statutes and legislation affecting children, including child pornography laws, state missing children clearinghouse, non–profit organizations, and interested child advocates, and training to professionals.

The **Child Welfare League of America** ("CWLA") is a federation of more than 700 child welfare agencies in the public and voluntary sectors. CWLA is almost three-quarters of a century old and has long been involved in the development of quality program, practice and policy in the field of child welfare, including child protective services. CWLA standards for quality practice address services to abused and neglected children, including children who have been sexually abused. CWLA standards expressly recognize that child sexual abuse includes the exploitation of children and child pornography. CWLA is committed to strong legal protections to ensure that children are not abused through

pornographic exploitation and that children are not placed at heightened risk of sexual abuse and victimization by pedophiles as a result of child pornography.

The National Council of Catholic Women is a nationwide federation of 8000 Catholic women's organizations representing millions of Catholic women. NCCW acts through its affiliated organizations to support, empower and educate all Catholic women in spirituality, leadership and service. NCCW programs respond with Gospel values to the needs of the Church and society in the modern world.

ChildHelp USA has come to the aid of children in distress since 1959. Childhelp is committed to fighting child abuse and neglect with research, treatment, and prevention programs. We operate the National Child Abuse Hotline (1-800-4-A-CHILD and 1-800-2-A-CHILD for the hearing impaired with TDD equipment), America's only 50-state, 24-hour, toll-free crisis intervention program. The Hotline is staffed by trained counselors with a masters degree or higher and has a data bank of over 60,000 service providers across the country. Childhelp also operates two residential treatment facilities for the most severely physically and sexually abused children ages 2 through 12, one in southern California, and one in central Virginia, and recently initiated programs in Knoxville, Tennessee. Our services include therapeutic foster homes, Head Start programs, group programs for teen and adult survivors of abuse, training programs for child care workers and foster parents, and education and advocacy initiatives.

Focus on the Family is a Christian, non–profit organization committed to strengthening the emotional, psychological and spiritual health of children and their families in the United States and throughout the world. Focus on the

Family's President, Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Focus on the Family has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book *Pornography: A Human Tragedy* which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Focus on the Family daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1400 stations. Its monthly magazine has a circulation of 1.85 million. Focus on the Family regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

The **Family Violence & Sexual Assault Institute** (FVSAI) was established in 1984 by Robert Geffner, Ph.D. The FVSAI became an independent, nonprofit corporation (501[c][3]) in 1991. The first Family Violence bulletin (FVB), now the Family Violence & Sexual Assault Bulletin (FVSAB), was published in 1985. The FVSAI is a national resource center and maintains an international clearinghouse of references and unpublished papers concerning aspects of family violence and sexual abuse, reviews information and materials, and then disseminates the information in the FVSAB, which is published quarterly and distributed internationally. The overall purposes of these two components of the FVSAI is to improve networking among

researchers, practitioners, and agencies, and to disseminate information.

In addition, the FVSAI, in cooperation with crisis centers, agencies, and counseling clinics, is involved in developing treatment programs for spouse/partner abuse and sexual abuse. We have also published two treatment manuals and four bibliographies, and are working on others. The focus of our program's research has been on victims and offenders of spouse/partner abuse and of incest.

The final components of the FVSAI involve training and consultation. We conduct seminars and workshops nationwide, as well as educational programs and conferences. We also serve as consultants to various organizations and agencies, providing program evaluation, research, and technical assistance.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

Help Us Regain The Children, a national legal research center and lobbying entity, has had the opportunity to query

child pornography and child sexual abuse investigators. We have learned of the inextricable tie between pornography and pedophilia. We are chagrined to have uncovered state and partially federally sponsored child welfare agencies, such as the Ohel Children's Home and Family Services, to have actively furnished children under their auspices for a well run child pornography/child pedophilia ring, operated by a Rabbi Avrohom Mondrowitz, who fled to the State of Israel immediately after his indictment in 1987. If the social standards were lowered to condone lascivious poses that involve clothed children, we fear that countless children will become enmeshed in this heinous operation, that can possibly and most ironically be supported by our taxpayer dollar if additional child welfare agencies were to follow in the path of the OHEL agency in Brooklyn, New York.

Child pornography is an ever expanding profiteering enterprise which claims numerous victims. The lowering of our social standards by raising the threshold for what constitutes child pornography (viz., nudity) portends a dangerous consequence to our children in our American society. Not only would our children be subject to execrable activities and opprobrious conduct of posing in a prurient fashion, but such detestable behavior has the propensity to lead to or to inhere acts of child sexual abuse.

The Free Congress Research & Education Foundation is a non-profit , non-partisan public policy research institute founded in 1978. Its priorities include the separation of powers, judicial restraint, and traditional family and social values. Amicus believes this case directly implicates all three of these fundamental concerns. The separation of powers means that Congress enacts statutes like the one in this case and the Department of Justice is to enforce, rather than re-write, those statutes. Judicial restraint requires fidelity to the statutory meaning intended by Congress over

that preferred by the Department of Justice. Traditional values means protecting children from abuse, as Congress sought to do in this statute.

Coalitions for America is a non-profit lobbying organization whose priorities include the protection of children from abuse. To that end, amicus seeks to promote protective, yet constitutionally permissible, legislation. Amicus urges this court to apply traditional rules of statutory construction to preserve the intended meaning of the statute at issue.

Save America's Youth , Inc., is a non-profit educational and advocacy organization concerned with the problems facing young people in America today. Amicus is affiliated with Freedom Village, USA, a successful long-term rehabilitation facility for troubled teenagers. Through that association, amicus knows first-hand the permanent and tragic effects of child abuse, including the sexual abuse that is child pornography. Amicus believes the statute at issue in this case can help combat this evil only if the protective legislative intent behind it is upheld.

Citizens Against Pornography is a non-profit organization with the purpose of educating and informing the public about the harmful effects of pornography, and promoting and encouraging enforcement and prosecution of obscenity and child pornography laws.

We believe that pornography is not a victimless crime. The dehumanization, assault on human dignity, and violence that is promoted through pornography destroys the very fabric of society.

Our belief is that our children are our greatest natural resource and we must do everything to protect them from

being exploited and abused. Child pornography is a most heinous crime. The 1984 Child Protection Act has been used for the past ten years to successfully prosecute pornographers. The intent and purpose of the Act must not be discarded because of a political agenda. Our children's lives and innocence must be protected.

Because of the betrayal of our Justice Department and endangerment of our children, we wish to be on record stating our interest and support for this brief.

Voices for Victims is a grassroots citizen action committee dedicated to aiding victims of violent crimes in obtaining justice. Far, far too often the rights of innocent people are ignored as juries and judges enter a sentence or a plea agreement in today's courts.

Voices for Victims are themselves crime victims who are interested in bettering the system, changing laws and molding the criminal justice system into being more responsive to the rights of crime victims regardless of race, creed, class, sex or age.

Voices for Victims advocates have been present at the time a violent criminal is sentenced in an effort to remind the judge of the victim and their rights in each case. We have aided in fund raising efforts for crime victim compensation. We have successfully educated the Virginia General Assembly on various laws and amendments relative to crime victims and their rights. We have specifically engaged in statewide educational efforts and legal reform efforts on behalf of victims of sexual assault, child sexual abuse and domestic violence.

Every five minutes in America there is a rape, every 22 seconds a violent crime occurs. Every violent crime leaves

in its wake one or more victims. Currently in the USA, there are more victims of crime than victims of heart attacks or cancer.

The Rabbinical Alliance of America, IGUD Horabbonim, is a professional rabbinical organization constituted of duly ordained Orthodox Rabbis occupying pulpits in the United States, Canada and throughout the world and/or serving on faculties of institutions of higher Jewish learning.

The Rabbinical Alliance of America, IGUD Horabbonim has been dedicated for the past 50 years to furthering widespread study of Torah and the fostering of fuller observance of strict Torah Judaism by meeting and providing the religious, ethical and moral needs and activities of our brethren on the national and international scene.

Christian Legal Defense and Education Foundation is a non-profit organization that represents churches and individuals across the nation. CLD provides legal counsel, Washington representation, and researching services to their supporters. The organization has filed many amicus briefs in the past in cases that directly address a concern that Christians share across America share. Most recently CLD filed a brief before the Supreme Court in Alexander v. U.S. a case where it was determined that the RICO laws could be used against pornographers.

Knox v. U.S. is of particular interest to CLD because it deals with pornography, children and the weakening of a long-standing statute. Christians in America want to protect children and punish those who deal wickedly with them. Our supporting churches have pledged their prayers, time, and money to battle the reinterpretation of the federal Child Protection Act. On behalf of all of our supporters, CLD asks

this court to maintain their previous position in this case and let the correct interpretation of the statute stand as it has for the last nine years.

The **Christian Life Commission/Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.4 million members in nearly 38,400 local churches. The Christian Life Commission is the public policy agency of the Convention, assigned to address moral and ethical issues, including the issue of pornography and obscenity. Amicus produces publications and seminars to educate Southern Baptist about public policy issues, to encourage responsible Christian citizenship as well as personal biblical decision-making in daily Christian life. Amicus also seeks to bring biblical principles and Southern Baptist convictions to bear before courts, legislatures and policy making bodies. Amicus frequently files briefs as amicus curiae in cases important to family and morality, such as this case.

Traditional Values Coalition (TVC) is a grassroots lobby and education group representing more than 31,000 churches nationally. TVC is used as a resource on public policy issues for its member churches. The churches serve as a resource to the community with various ministries to people grappling with pornography addiction and victims of pornography-related sexual abuse.

Traditional Values Coalition has taken a leadership role on issues relating to pornography since 1985. TVC monitors, evaluates and affects legislation, court actions, and cultural trends to take an informed and aggressive stand against pornography. TVC actively lobbied Congress in support of the Pornography Victims Compensation Act of 1991.

In the California legislature TVC successfully lobbied for a bill that instituted most of the Miller Standard for the state of California, allowing the state to maintain a standard of decency by which all works of pornography are judged. TVC has also promoted other anti-pornography bills including, the News Rack Bill (prohibiting the sale of pornography in vending machines except in adult only areas), the Dial-A-Porn Bill (preventing children from accessing phone pornography without a credit card) and a bill that would make it a crime for parents to expose their children to pornographic material.

TVC's founder and chairman, Rev. Louis P. Sheldon, has held and addressed Minister's Conferences on the impact of pornography on America's culture. Rev. Sheldon has also debated the issue on numerous television and radio programs.

TVC is headquartered in Anaheim, California, and maintains a Washington, D.C. government affairs and media office on Capitol Hill, as well as several regional offices around the country.

Christian Action Network is a 501(c)(4) lobbying organization dedicated to encouraging, supporting, and perpetuating traditional American values. As such, and on behalf of its 100,000 supporters, the Christian Action Network works to ensure that the traditional family and its fundamental liberties are protected against government encroachment.

Justice for Children ("JFC") is a national child advocacy organization headquartered in Houston, Texas. JFC works for the child who is abused, abandoned, neglected or simply lost in the child welfare, family court, and/or criminal justice systems. Unlike other child advocacy organizations which have been formed to prevent child abuse

through education and social programs, JFC focuses on protecting the abused child once an initial report has been made to the authorities. We work and speak for those who are too young or too frightened to speak for themselves.

Child Protection Lobby, Inc. is a California non-profit 501(c)(4) corporation based in suburban Washington, D.C. Child Protection Lobby is chaired by Kathleen M. Sheldon, a survivor of child sexual abuse and victim of child pornography. Over a number of years, beginning at age seven, Mrs. Sheldon was raped and forced to perform a variety of sexual acts with others, on camera, for the purpose of producing child pornography. Mrs. Sheldon is a living, "flesh and blood" example of the direct casual link between child pornography and child sexual abuse.

As an organization whose sole purpose is to ensure that laws exist to protect children from horrors like child pornography and child sexual abuse, Child Protection Lobby believes that it is essential that all such violations of both the letter and the spirit of the law be vigorously enforced and prosecuted and that such laws be interpreted as inclusively as possible, as was the Congressional intent.

The **Lutheran Church--Missouri Synod (LCMS)** is a 2.6 million-member Christian denomination with more than 6,000 congregations and more than 22,000 professional church workers nationwide. It is the country's ninth largest church body and supports the largest Protestant elementary school system in the United States. The LCMS has its national offices in St. Louis, Mo., and has 33 regional and two non-geographic district offices across the country.

The denomination's highest legislative assembly, its national convention, in 1986 formally resolved to intensify efforts to curb pornography, violence, obscenity and

indecency. A statement on pornography adopted with that resolution states in part: "immoral behavior is preceded by immoral thoughts and a perverted will. Pornography and its use must be condemned not only for the sexual abuse which may ensue, but also for the fantasies in which those who read and view it indulge themselves." It notes that "pornography seeks to arouse sexual desire that is directed not toward the good of another within the fellowship of the marital union, but toward self-gratification--a mark of the unredeemed life (I Thessalonians 4:5)." The statement adds that the sexual deviancy which is accepted as normal by pornography is among those social evils that "rend the fabric of society and make an agony of the common life that should in God's intent have been a blessing to mankind."

Child pornography, at issue in this present case, raises additional concerns, because it is a form of child abuse. The 1989 LCMS convention, which reaffirmed the 1986 resolution, also resolved to encourage support for prevention of child abuse, noting that "child abuse is cyclic, often perpetuating godless life-styles in victims, including abuse of their own children, crime, drug and alcohol abuse, and the inability to form relationships..."

Members of LCMS congregations are increasingly concerned for the men, women and children of all ages who are victimized by pornography and about the effects of pornography, violence, obscenity and indecency on our children, families, communities and society. It is in response to such concerns that the LCMS joins this brief in support of the respondent.

Women Against Pornography (WAP), founded in 1979, is a New York City-based feminist organization with a national membership. WAP considers pornography to be a practice of sexual discrimination, exploitation, and abuse that

undermines the status of women and legitimizes violence against women and children. WAP publishes a newsletter, gives slide presentations and lectures to college and community groups, and organizes protests of pornography and pornography-influenced media. While WAP's primary goals are public education and consciousness-raising, the organization supports legislation, national and international, that identifies pornography as a violation of women's civil and human rights and holds pornographers liable for injuries they inflict on women and children.

Eagle Forum is a pro-family organization dedicated to building a better educated, safer, and stronger America. As a pro-family organization, the issue of child pornography is of great concern to Eagle Forum, especially child pornography. The attempt by the Department of Justice to redefine current child pornography laws greatly distresses our membership of over 80,000 men and women. The new definition given by Justice shifts responsibility to the innocent children and away from those who produce the child pornography.

National Alliance for Family Court Justice is a grass roots coalition of victim support groups organized for the purpose of seeking relief from serious systemic failures in all phases of the family court system. The coalition is composed of independent support groups in 18 states whose director and organizer is Elisabeth Richards of Annandale, Virginia. She and others in the support groups have extensive pro se litigating experience in matters related to child abuse and custody battles. Ms. Richards has been actively seeking political support for administrative intervention of serious cases being mishandled by social service agencies.

Group members have encountered a pattern of deliberate indifference by judges, social workers and attorneys. This conduct obstructs causes of action and/or evidence in matters where physical, sexual and emotional

child abuse is a factor. Some court authorities are so hostile toward the issues and evidence of the abused child and the traumatized protecting parent, that they engage in obstructionist court fraud such as labeling medical documentation as evidence of lying, labeling children's statements and physical injuries as evidence of parental brainwashing. Due process violations such as ex-parte custody switches are also a problem. Group members who have persisted in their causes have also experienced vindictive court reprisals such as jailings and punitive financial penalties on frivolous grounds. The perpetrator is usually actively protected, supported and encouraged by these malfeasant court officials whose focus seems more on exploiting the situation than making objective determinations or findings suitable relief from wrongdoing.

Most supplicants lose custody of their children to the alleged abuser with visiting rights either drastically reduced or completely taken away. This devastating experience with the courts has made many of the victimized parents dysfunctional. Individual groups have been working together for self-help purposes, several made pro se appeals to their state Supreme Courts and others have attracted political supporters but unfortunately, few have achieved significant case relief.

Because of the extreme bias against child abuse exhibited by many court professionals, National Alliance for Family Court Justice supports stronger precedents for taking action against child abusers of all types.

Christian Coalition is a grassroots coalition of Evangelicals, pro-family Catholics and Jews formed to encourage government and the media to be responsive to our concerns. We are an issue-oriented organization, designed to mobilize and train people of faith for effective political action. Our five-fold mission is to 1) represent people of faith before local councils, state legislatures and Congress; 2)

speak out in the public arena and in the media; 3) train leaders for effective social and political action; 4) inform people about timely issues and pending legislation; 5) protest anti-Christian bias and defend the legal rights of people of faith.

Christian Coalition promotes traditional values through a network of state affiliates and county chapters. Our broad-based membership monitors legislative initiatives of concern to our membership, takes concerted action to further our mutual interests, and interacts with state and local officials.

Child pornography directly affects the physical and psychological well being of our children. Christian Coalition's stated purpose is to reverse the moral decline in American families and it condemns the weakening of laws designed to protect the children who are America's future.

The **National Center for Redress of Incest and Sexual Abuse** ("Center for Redress") is a foundation established to address the legal needs of adult survivors and child victims of sexual abuse. Located in Washington, D.C., its purpose is to build a comprehensive network of attorneys across the country who are dedicated to furthering the rights of survivors under the law; to develop educational outreach programs, focusing on members of the judicial and legislative branches of government; to facilitate a national grassroots effort to support projects in progress on the issue of sexual abuse and incest; and to litigate test cases under civil law related to childhood sexual victimization. The Center for Redress believes that the connection between childhood sexual abuse and child pornography has been established beyond doubt, and supports the enforcement of laws aimed at preventing the production and distribution of child pornography, such as the law at issue in this case.

The American Coalition for Abuse Awareness ("ACAA") is an ad hoc coalition of individuals and groups committed to resolving the issue of sexual abuse of children. The ACAA has been founded to seek enactment of federal and state legislation establishing the right of a child to be free from sexual victimization, and appropriate protections to assure that such victimization does not occur; enactment of federal and state legislation extending or eliminating statutes of limitations relating to civil lawsuits brought by adult survivors of childhood sexual abuse; formation of a broad based Coalition to support such legislation; development of public and media awareness of the issue of sexual abuse of children; establishment of a comprehensive network of legal professionals nationwide dedicated to advancing the legal rights of victims of childhood sexual abuse through the justice system; development of educational outreach programs for members of the judicial and legislative branches of government; establishment of a national body to make policy recommendations on issues related to childhood sexual abuse, protection of children, and adult survivors of abuse.

VOICES In Action, Inc. is an international organization of survivors and supporters of survivors of incest and child sexual abuse that is dedicated, among other things, to the prevention of incest and child sexual abuse in our society. VOICES is a nonprofit organization headquartered in Chicago, and is the largest membership organization of incest and child sexual abuse survivors in the United States. VOICES' members believe that child sexual abuse is not limited to intercourse, but includes other forms of sexual violation, such as voyeurism, pornography or exhibitionism.

VOICES is strongly committed to ending the traffic of child pornography in all its forms. VOICES therefore urges in the strongest possible terms that this Court affirm Petitioner's conviction. The "Nather Tapes" and the

associated "Nather Notes" clearly constitute a form of child pornography that is itself a form of sexual abuse perpetrated upon the children who appear in the tapes. Worse, the "voice overs" on these tapes and the associated "Nather Notes" clearly indicate that these child "models" are at high risk to be drawn further into the pornography trade and subjected to still other acts of sexual abuse.

The **Ending Men's Violence Network** (EMV-Net) is a collective of grassroots efforts by men and men's organizations to end men's violence. We are made up of groups primarily in the United States and Canada who are working with men on ending woman abuse, rape, sexual harassment and pornography and prostitution. Included in our collective are counseling programs working with men who batter and/or men who sexually abuse; educational groups for men in communities, highschools, and colleges; activist groups; fundraising organizations; and more.

Unlike most men's organizations, the EMV-Net maintains strict and clear lines of accountability to the feminist leadership of the overall ending men's violence movement, as well as to the victim-survivors of men's violence. While most of us work most directly with men, either as perpetrators or in the general population, we recognize that our work has direct ramifications for women, children and other who are victimized by men's violence.

Programs offered by the EMV-Net include a quarterly newsletter, legislation monitoring, frequent action alerts, support services for local efforts to respond to and end men's violence, educational programs, and professional training.

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No. 94-413

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STEPHEN A. KNOX,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Other Authorities

H. Rep. No. 536, 98th Cong., 1st Sess.,
(Nov. 10, 1983), reprinted in 1984 U.S.
Code Cong. & Admin. News 5

S. Rep. No. 438, 95th Cong., 2d Sess.,
(1977), reprinted in 1978 U.S.
Code Cong. & Admin. News 6

CONSENT OF THE PARTIES

Attorneys for Petitioner and Respondent have consented to the filing of an amicus curiae brief by National Family Legal Foundation. (Appendix A).

INTEREST OF AMICUS CURIAE

National Family Legal Foundation ("NFLF") is a non-profit legal organization founded in 1990. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. NFLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by child pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area.

NFLF's former Executive Director, Alan E. Sears, was also the Executive Director of the Attorney General's Commission on Pornography. The Commission, after more than two years of examining the issue from legal, moral, clinical, social scientific, and other relevant perspectives, concluded that possession of child pornography is so intimately connected to the acts of child molestation depicted that a prohibition on possession of such material was required and that such laws needed to be zealously enforced, in a constitutional manner, for the protection of children. Mr. Sears and the Honorable Edwin Meese, who as Attorney General issued the Commission's Final Report, both serve on NFLF's Board of Directors.

NFLF seeks to file an amicus curiae brief in support of the United States in this case. NFLF is profoundly concerned with the victimization and exploitation of children by child pornographers. It believes the circuit court's

decision is a thorough, reasonable and constitutional interpretation of the federal child exploitation statute.

REASONS FOR DENYING THE PETITION

Petitioner is seeking review of the Third Circuit's decision upholding his conviction for receipt and possession of child pornography and upholding the constitutionality of Title 18, United States Code, §2252 *et seq.* *United States v. Knox*, 1993 WL 664475, ___ F.3d ___ (3rd Cir. 1994) (reproduced in the Appendix to the Petition, PA 1-52).

The Third Circuit held "that a 'lascivious exhibition of the genital or pubic area' pursuant to 18 U.S.C. §2256(2)(E) encompasses visual depictions of a child's genitals or pubic area even when these areas are covered by an article of clothing and are not discernible." PA 51-52.

Although this Court granted certiorari previously in

this case on June 7, 1993 and then remanded to the Third Circuit, we urge the Court not to grant this Petition for a Writ of Certiorari. The Third Circuit's decision, after remand, is not in conflict with any other court of appeals, is not in conflict with a state court of last resort, does not depart from the accepted and usual course of judicial proceedings, and has not decided an important question of federal law which has been unsettled or is in conflict with this Court's decisions. Additionally, as the Third Circuit's thorough opinion and our argument demonstrate, the petitioner is incorrect on the merits of the case.

A. While the legislative history of 18 U.S.C. §2252 is unclear concerning the requirement of nudity, the statute's purpose is clear -- to protect children from sexual exploitation.

As the Third Circuit found, the legislative history of 18 U.S.C. §2252 *et seq.* is unclear:

> Because we find both interpretations of this letter plausible, and the legislative history in toto to be silent as to whether Congress intended the statute to reach non-nude depictions, we do not rely on it in

> adhering to our prior statutory interpretation. We conclude that Knox has not met his burden of proving that Congress intended the statute to reach only a nude "lascivious exhibition of the genitals or pubic area." Thus, we will not read a nudity requirement into a statute that has none.

PA 37-38. However, the overall purpose of the statute is clear -- the protection of children -- and the statute should be construed to accomplish that purpose.

Federal statutes prohibiting the sexual exploitation of children through the production of pornography -- as distinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H. Rep. No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983), reprinted in 1984 U.S. Code Cong. & Admin. News, 492.

Congress recognized that the distribution and receipt

of child pornography contributes to further incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish contact with other pedophiles, and even to establish liaisons with some of the child models.

S. Rep. No. 438, 95th Cong., 2d Sess., at 5 (1977), reprinted in 1978 U.S. Code Cong. and Admin. News, 43.

This Court recognized the substantial governmental interest in protecting children from the evils of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). In an opinion by Justice White, the Court upheld a New York statute which prohibited the distribution of materials which depict children engaging in sexually explicit conduct whether or not such depictions are "obscene".

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding

the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 756-57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Further, the Court went on to say:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759 (footnote omitted). The Court concluded, because of the compelling state interests involved, that child pornography, even if not obscene, was not protected by the First Amendment.

Finally, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court approved a law prohibiting the possession of

child pornography, even in one's own home. In upholding the statute, this Court further addressed the impact of this vile crime:

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain....[E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Id. at 110-11.

Petitioner acknowledges only a portion of the statute's purpose:

> While it is true that the underlying purpose of the federal child pornography law is to prevent psychological harm to children, there is no evidence anywhere to suggest that an image of a minor whose genitals and pubic area are fully covered could, regardless of where the camera is focused, cause the kind of psychological harm with which Congress and the American public were concerned when the first federal child pornography law was passed in 1977. Indeed, labeling the images on the Nather tapes "child pornography" would appear to trivialize the experiences of those who were or are victimized by involvement in *actual* child pornography.

Petition, pp. 16-17.

This totally overlooks the additional harm associated with these materials, and as referred to in *Osborne*, their use in seducing other children into sexual activity. Further, it must be remembered that in this case, whether genitals and pubic area are scantily clad or not, the children depicted in these provocative videotapes are victims who are exploited for the sexual gratification of adults. None of them could consent to be posed and then lusted after by pedophiles like Knox. Knox is a pedophile, and the materials are obviously directed at pedophiles:

> The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera. The children were obviously being directed by someone off-camera. All of the children wore bikini bathing suits, leotards, underwear or other abbreviated attire while they were being filmed. The government conceded that no child in the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing. The photographer would zoom in on the children's pubic and genital area and display a close-up view for an extended

> period of time. Most of the videotapes were set to music. The films themselves and the promotional brochures distributed by Nather demonstrate that the video tapes clearly were designed to pander to pedophiles.

United States v. Knox, 977 F.2d 815 (3rd Cir. 1992). The same compelling state interests which were present in *Ferber* and *Osborne*, and any case involving child pornography, are present in this case.

B. The Third Circuit's Ruling Is Consistent With This Court's Prior Pandering Decisions Concerning Obscenity.

1. Evidence of Pandering May Be Decisive in Determining Obscenity.

Pandering is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers." *Ginzburg v. United States*, 383 U.S. 463, 467 (1966), quoting *Roth v. United States*, 354 U.S. at 495-96 (Warren, C.J., concurring). In *Ginzburg*, the defendant was convicted of violating the federal obscenity statute as a result of mailing three

different publications. Routinely, on questions of obscenity, the Court considers the materials as sufficient in themselves for that determination. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973). But in *Ginzburg*, the prosecution charged the offense of obscenity in the context of the circumstances of production, sale, and publicity and conceded that, standing alone, the publications themselves might not be obscene. *Ginzburg*, 383 U.S. at 465. The Court approved this approach.

> We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise... we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.

Id. at 465-66 (emphasis added).

The Court concluded:

> Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.

Id. at 470. Thus, in *Ginzburg*, even though the three publications were not "hard core pornography", and presumed not obscene *per se*, they were deemed obscene because their prurient qualities were pandered or exploited by the defendant.

The development of this concept led the Court to hold in *Splawn v. California*, 431 U.S. 595, 598 (1977):

> There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.

Further, despite the defendant's objection that the jury instruction allowed "the jury to consider motives of commercial exploitation on the part of persons in the chain of distribution of the material other than himself", the Court found no constitutional problem. *Id.* at 599.

In *United States v. Dost*, 575 F.2d 1303 (10th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978), the circuit court held that evidence of pandering was admissible as relevant

to whether the materials were obscene, even though the defendants were not charged with pandering and despite pandering not being an element of the crimes charged. As stated by the court, at 1305, the jury "could take into consideration the 'setting' in which the photographs and brochures were presented by the two defendants."

Finally, this Court upheld in *Hamling v. United States*, 418 U.S. 87 (1974), an instruction that the jury could consider evidence of pandering in applying the three-part obscenity test. The instruction approved by the Court stated, in part:

> In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in another context, the material would escape such condemnation.

United States v. Hamling, 481 F.2d 307, 322 (9th Cir. 1973).

Pandering is an important consideration in an obscenity case and similar evidence should be used to make a determination of whether an item constitutes child pornography.

2. Evidence of Pandering is Relevant and May Be Decisive to the Question of Child Pornography

Knox's conduct shows that he intentionally brought his activities and the material at issue within the legitimate reach of the child exploitation statute. These child depictions were "pandered" as clearly as Ralph Ginzburg pandered his otherwise non-obscene material into the reach of the obscene mailing statute.

The child exploitation statutes are intended by Congress, as evidenced by the plain meaning of the statutes read as a whole and as discussed earlier, to prevent and prohibit the exploitation of minors for sexual purposes. Applying the pandering principle is a proper and established method for courts to determine whether the defendant

should be convicted by focusing on the conduct of the defendant as "pornographer", "child pornographer", "sexual-exploiter", or "pedophile". Whatever legitimate uses there may ever be as to some forms of child nudity or sexual depictions, see *New York v. Ferber*, 458 U.S. 747, 775 (1982) (O'Connor, J., concurring), Knox's intentional pandering of children's panty-clad sexual organs cannot fit that possible exception.

In this regard, employing the pandering rule, when presented with "borderline" material, prevents innocent persons from being brought within the statute by requiring that guilty defendants be shown to have intended to exploit the sexual aspect of the materials. Pandering analysis therefore acts in a manner that narrows construction of the child exploitation statute by allowing proof of intended sexual exploitation of a minor to eliminate any claims of innocent or serious value purposes.

In this case, the material pandered to, and Knox

responded to, the lasciviously child-erotic ("prurient") interest in child sexuality or pedophilia, every bit as much as Ginzburg pandered to the voyeuristically erotic adult interest in titillation over adult sexuality with his non-mailable pornography. *Ginzburg*, 383 U.S. at 470. Under the specific facts of this case, these "peeping tom" views into the private areas of minors are well within the legitimate scope of this federal statute because they clearly are intended to exploit these minors in the sexual way that Congress and the courts have long recognized as harmful to the best interests of children.

3. The Record is Replete with Evidence of Pandering and that Knox knew of the nature of the videotapes

The Third Circuit found, both times, and there can be no serious dispute otherwise, that "the videotapes clearly were designed to pander to pedophiles." *United States v. Knox*, 977 F.2d 815, 817 (3rd Cir. 1992) and PA 50-51. The court further noted that:

> The catalogs described in detail the contents and intended effect of the films that could be purchased:
>
> "'Sassy Sylphs' will blow your mind so completely you'll be begging for mercy. Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better)."

977 F.2d at 818.

Not only were the tapes advertised and promoted for their titillating nature to Knox, but Knox used them for that purpose -- for sexual arousal of his pedophilic tendencies:

> For instance, on the Nather II tape, Knox wrote "13-year old flashes" followed by "hot". Knox characterizes the second vignette as "15 year old shows nipple." Both Nather's and Knox's descriptions of the tapes clearly demonstrate that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile. Sufficient evidence was presented at the bench trial to support a finding that Knox was aware of the nature of the Nather tapes, and therefore knowingly possessed and received them.

Id at 825 and PA 50-51.

Knox's own conduct, and the circumstances of distribution and advertising, compel a finding that these tapes are child pornography. That the distributor, Nather Company of Las Vegas, claimed these tapes were "completely legal" is of no import. Just as Ginzburg's circulars claimed to be legal and "the result of recent court decisions", *Ginzburg*, 383 U.S. at 468, fn.9, the exploiter's self-classification is not significant. Knox knew he was walking a fine line. The mere fact that Nather stressed the legality of its tapes in its newsletters, which were found in Knox's apartment, put Knox on notice that such an assertion was doubtful:

> Additionally, relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advice as to whether the material he earns a living by selling is legal. Nather's disclaimer could not reasonably lead Knox to believe that the videotapes were legal. If anything, the need to profess legality should have alerted Knox to the films' dubious legality.

977 F.2d at 825 and PA 51.

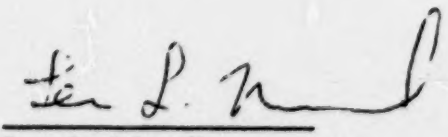
CONCLUSION

To grant these kinds of materials constitutional protection merely ensures that thousands of children will continue to be victimized, both by being depicted in this manner, and by potentially becoming victims of a sexually aroused child molester. There will be no way to prevent sexually provocative depictions of scantily clad young girls and boys, with cameras focusing in on genital and pubic regions, from being traded in the marketplace. The worthy effort to prevent child sexual exploitation by drying up the market for child pornography used by pedophiles, which was so eloquently defended by this Court in *New York v. Ferber*, would be significantly undercut by a reversal of pedophile Steven Knox's conviction.

For all the foregoing reasons, we urge this Court to deny Knox's Petition for a Writ of Certiorari in this case.

Dated November 10, 1994.

Respectfully Submitted,



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APPENDIX A

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

September 28, 1994

Len L. Munsil, Esq.
National Family Legal Foundation
5353 North 16th Street
Suite 400
Phoenix, Arizona 85016

Re: Stephen A. Knox v. United States, No. 94-413

Dear Mr. Munsil:

In response to your letter of September 26, 1994, I hereby consent to the filing in the above-captioned case of an amicus curiae brief on behalf of the National Family Legal Foundation.

Sincerely,

Drew S. Days, III
Solicitor General

APPENDIX "A"

9.

I, Alan Silber, counsel for Petitioner, do hereby consent to the filing of an Amicus Curiae Brief by National Family Legal Foundation in *Knox v. US*, No. 94-0-13.

Date

Alan Silber
Attorney for Petitioner

llm:akt
enclosure

APPENDIX "A"

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae, National Family Legal Foundation, In Opposition To The Petition For Writ Of Certiorari" have been sent by U.S. Mail, Postage Prepaid, on this 10 day of November, 1994 to:

Alan Silber
Hayden, Perle & Silber
1500 Harbor Boulevard
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Drew S. Days, III
Solicitor General
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Len L. Munsil